No. 87-5840-ASX
Status: DECIDED

Title: Edward McNamara, Appellant
v.
County of San Diego Department of Social Services

Docketed:
October 28, 1987

Court: Court of Appeal of California,
Fourth Appellate District

Counsel for appellant: Sutherland,James E.

Counsel for appellee: Prather,Helen, Wallace,Daniel

Notice of Appeal filed October 27, 1987.

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1987	G	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
5	Oct 28 1987	D	Motion of appellant for leave to proceed in forma pauperis filed.
3	Dec 10 1987		Motion of appellee County of San Diego to dismiss or affirm filed.
4	Dec 17 1987		DISTRIBUTED. January 8, 1988
6	Jan 11 1988		Motion of appellant for leave to proceed in forma pauperis DENIED. Appellant is allowed until February 1, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a jurisdictional statement in compliance with Rule 33 o the Rules of this Court.
7	Feb 2 1988		Application for extension of time within which to submit a jurisdictional statement in compliance with Rule 33 granted to and including March 1, 1988 by O'Connor, J.
8	Feb 27 1988		Order of January 11, 1988 complied with.
9	Mar 3 1988		REDISTRIBUTED. March 18, 1988
10	Mar 21 1988		Record filed.
		*	Certified copy of original record, 9 volumes, received.
11	Mar 24 1988		REDISTRIBUTED. April 15, 1988
12	Mar 31 1988		Record filed.
		*	Certified copy of original record.
14	Apr 18 1988		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
16	May 27 1988		Order extending time to file brief of appellant on the merits until June 30, 1988.
26	Jun 29 1988	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
18	Jun 30 1988		Brief of appellant Edward McNamara filed.
19	Jul 1 1988		Joint appendix filed.
25	Jul 5 1988		Brief amicus curiae of Christian Van Deusen filed.
21	Jul 13 1988		Order extending time to file brief of appellee on the merits until September 1, 1988.
22	Sep 1 1988		Brief amicus curiae of Barker Foundation filed.
23	Sep 1 1988		Brief of appellee County of San Diego, Dept. of Social Services filed.
24	Sep 1 1988		Brief amicus curiae of National Committee for Adoption filed.
27	Sep 15 1988		Motion of American Civil Liberties Union, et al. for

No. 87-5840-ASX

Entry	Date	Note	Proceedings and Orders
			leave to file a brief as amici curiae GRANTED.
28	Sep 16 1988	G	Application (A88-221) to extend the time to file a reply brief from October 1, 1988 to October 20, 1988 by appellants, submitted to Justice O'Connor.
29	Sep 19 1988		Application (A88-221) granted by Justice O'Connor extending the time to file until October 10, 1988.
30	Sep 28 1988		CIRCULATED.
31	Sep 30 1988		Set for argument. Monday, November 28, 1988. (3rd case) (1 hr.)
32	Oct 8 1988	X	Reply brief of appellant Edward McNamara filed.
33	Nov 18 1988	D	Motion of Christian R. Van Deusen for leave to participate in oral argument as amicus curiae, for divided arguemnt and for additional time for oral argument filed.
34	Nov 28 1988		Motion of Christian R. Van Deusen for leave to participate in oral argument as amicus curiae, for divided arguemnt and for additional time for oral argument DENIED.
35	Nov 28 1988		ARGUED.
36	Dec 6 1988		Appeal DISMISSED for want of a properly presented federal question. Opinion per curiam.

No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

EDWARD McNAMARA,

Appellant,

v

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WHO PROMPTLY MANIFESTED A SIGNIFICANT PARENTAL INTEREST IN HIS CHILD AND WOULD BE A GOOD PARENT SOLELY BECAUSE IT IS IN THE BEST INTERESTS OF THE CHILD?

II

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WITHOUT A FINDING ADVERSE TO HIS PARENTING ABILITY WHEN (A) OTHER FATHERS MUST BE FOUND TO HAVE NO INTEREST IN OR ABILITY FOR PARENTING BEFORE THEY LOSE THEIR RIGHTS, AND (B) UNWED MOTHERS DO NOT LOSE THEIR RIGHTS UNDER SIMILAR CONDITIONS?

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OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, which appears in the separate Appendix submitted herewith, p. 1a, was reported at 191 Cal.App.3d 786, but was ordered not to be published in the Official Reports by the California Supreme Court, p. 69a.

The opinion of the California Supreme Court, which applied as law of the case, appears in the Appendix, p. 36a, held that the "best interests of the child" test applied, and was constitutionally sound, and remanded the case for further proceedings. It was reported at 37 Cal.3d 65, as *In re Baby Girl M.*

GROUNDS FOR JURISDICTION

1

THE JUDGMENT APPEALED

Edward McNamara appeals from the final judgment of the Court of Appeal of the State of California, dated April 30, 1987, p. 1a. The judgment terminated all of his parental rights as to a child born out of wedlock, but as to which he had proved paternity and sought to raise as his own soon after birth, within the statutory time for seeking custody.

The California Supreme Court had previously ruled in the case, as law of the case, and the Court of Appeal declined to reconsider, that California's custody test of "best interests" of the child controlled paternity suit

claims by father's seeking to retain their parental rights. That test is that a parent is entitled to custody unless custody with the parent would be detrimental to the child. The court also ruled that the best interests/detriment to the child test is the constitutional equivalent of proving unfitness of the unwed father to have parental rights.

No appeal was filed previously because the judgment terminating parental rights was not final; it was subject to the unwed father, appellant, proving he was the best person to have custody so he could retain his rights.

A timely petition for review was denied July 30, 1987, and this appeal is being docketed within 90 days of that denial.

STATUTORY BASIS FOR JURISDICTION

Jurisdiction for appeal is based on 28 U.S.C. § 1257(2).

The California Supreme Court and Court of Appeal ruled that California Civil Code, section 7017, subdivision (d), as applied, was not repugnant to the United States Constitution, Amendment XIV, as it did not deny appellant equal protection of the laws or due process of law.

Appeal jurisdiction lies where the state court has actually decided that a state statute as applied is not repugnant to the United States Constitution. *Charleston Fed. S. & L. Assn. v. Alderson,* 324 U.S. 182, 185-186 (1945); *Edwards v. Elliott,* 21 Wall. (88 U.S.) 532, 550-551 (1874); accord, *Allenberg Cotton Co. v. Pittman,* 419 U.S. 18, 22 (1974); *Poulos v. New Hampshire,* 345 U.S. 395, 403 (1953).

Alternatively, the court should treat the papers as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, and grant the writ. (Rules 17.1 (b) (c); cf., *Kulko v. Superior Court,* 436 U.S. 84, 90, n. 4 (1978).

o

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent California statutes are in the Civil Code. Section 4600, Appendix, p. 70a, covers child custody in general and sections 7004, p. 70a, 7006, p. 71a, and 7017, p. 72a, are part of the Uniform Parentage Act.

o

STATEMENT OF THE CASE

Edward's daughter, Katie, was born July 18, 1981. He and the mother had dated during the fall of 1980, but did not see each other after November. Edward did not know of the pregnancy nor of Katie's birth until after August 1, 1981. The mother told him after Katie had been placed in a foster home. The mother wanted Katie adopted by strangers, and she wanted Edward not to have any contact with his daughter.

Not knowing that Katie was to be relinquished for adoption, Edward explored possible placements. At first, because he had two sons with him, he suggested his daugh-

ter be placed with his friends. On August 10th, he learned the mother was giving Katie up for adoption. Fearful he would never see her again, he asked for custody.

The statute allowed him 30 days to seek custody and assert parentage [Cal. Civil Code, § 7017, subd. (d), p. 72a] He acted well within that time and promptly under the circumstances.

At the initial hearing in December of 1981, the trial court found that Edward was the biological father and a "good parent [who] can provide a good, loving home for the child." But the court found that the best interests of the child would be served by giving custody to the prospective adoptive parents who had cared for her a total of five months. It was felt she had "bonded" with them and could not form a relationship with her father.

The California Supreme Court reversed, holding that unwed fathers, who are not presumed fathers, Cal. Civil Code, § 7004, sub. (a), p. 70a, are entitled to the parental preference presumption, Cal. Civil Code, § 4600, p. 70a. Custody may not be awarded to a nonparent unless custody with a parent would be detrimental to the child. [p. 39a-42a] The court, however, remanded the case for further proceedings to determine if the passage of time had changed circumstances so that Edward was no longer entitled to custody. [p. 50a]

Further hearing was held in February of 1985. No evidence showed Edward other than a good and loving parent who can provide a good home. [p. 6a] All parental rights were terminated, however, because Katie had been with the prospective adoptive parents for over four years and removing her would be detrimental. The Court

of Appeal affirmed, finding that there was substantial evidence to support the finding of detriment to the child, the only issue left open by the California Supreme Court. [pp. 6a-7a]

At all times, Edward has been a good and loving father who has manifested significant parental interest.

Edward sought custody shortly after learning of Katie' birth. He has been found to be a good parent.

At the first hearing, there was no evidence even of detriment to the child if removed from the foster parents after five months. [p. 49a] The trial court found he was a good parent who could provide a loving home. [p. 37a]

That evidence did not change at the second hearing. [p. 6a] Indeed, the trial court encouraged the adoptive parents to make Edward part of Katie's life. [p. 5a] There is no way to enforce visitation after termination of parental rights, of course, and visitation pending appeal was denied. There has been no contact since shortly after birth.

Edward is not an unfit parent and promptly acted to assert his parental rights and assume his parental duties. Katie's birth.

California applied a best interest test to terminate parental rights of an unwed father.

Under California Civil Code, section 7017, subdivision (d), p. 72a, as applied by the California courts, the test for terminating parental rights of unwed fathers who are not presumed fathers, Cal. Civil Code, § 7004, p. 70a, is what is in the best interests of the child. [p. 39a]

That is the result. There is a parental preference which must be overcome by a showing it would be detrimental to the child to give custody to the parent. [pp. 48a-49a] The statute has been amended so that there no longer is even that parental preference for fathers not presumed fathers. It now is a straight best interest test. [p. 13a, n. 7] If custody with someone else would be better for the child, the father loses, as Edward did.

The courts rationalized this by saying that the U. S. Supreme Court has never ruled on the issue, having reserved the question. [pp. 45a-48a] "The Supreme Court has not directly considered a fact situation similar to ours, where a mother has relinquished a newborn child and refused the father any contact. Thus the court has not addressed whether the natural father's parental rights may be terminated by only a best interests standard, or if a further finding of detriment is required." [p. 47a]

The court refused to hold that a finding of unfitness is required or even that the same standards apply to Edward as apply to other fathers, presumed fathers, which includes every one the mother lets have contact. Cal. Civil Code, § 7004, p. 70a. Other parents must be found to have abandoned the child or otherwise demonstrate an inability or lack of interest in their child. Cf., Cal. Civil Code, § 232. The unwed mother's consent to adoption is always required. Cal. Civil Code, § 7017, subd. (d), p. 72a.

There is a significant difference, too, between loss of custody and termination of parental rights. Custody may be modified and visitation allowed. Cf., Cal. Civil Code, § 4600. [p. 70a] Even if the foster parents got custody because of the delays in the courts, Edward might get the visitation the trial court thought he should have and encouraged it. Possibly, he could get custody; if not now, later.

At least he would have a relationship—and still could—during childhood and beyond.

Now those sweet and memorable moments, those irreplaceable moments, that companionship, are gone forever.

A parent deprived of parental rights also loses substantial legal rights: the right to earnings during minority, the right to inherit, and the right to be supported in old age, if necessary.

The losses are significant and based solely on the best interest test.

The California Supreme Court ruled that a finding of detriment and best interests is the constitutional equivalent of a finding of unfitness; at least it will be until this Court directs otherwise. [p. 47a] That, of course, is logically absurd. One describes the father and the other factors beyond his control, having nothing to do with the father.

After remand, the Court of Appeal believed the constitutional issue was foreclosed by the California Supreme Court [p. 6a, n. 2-7a], and the California Supreme Court denied review. [p. 68a]

REASONS QUESTIONS PRESENTED ARE SUBSTANTIAL

I. PARENTAL RIGHTS ARE SUBSTANTIAL AND CONSTITUTIONALLY PROTECTED

The right to parent one's children has been vindicated in a long line of cases. It is a fundamental right. *Prince*

v. Massachusetts, 321 U.S. 158, 166 (1944). The rights of natural parents have also been vindicated, even though the child is born out of wedlock. *Lehr v. Robertson,* 463 U.S. 248, 257-258 (1983); *Stanley v. Illinois,* 405 U.S. 645 (1972).

II. THE ISSUE OF TERMINATING PARENTAL RIGHTS SOLELY IN THE BEST INTERESTS OF THE CHILD HAS BEEN RAISED AND RESERVED BY THIS COURT

As the California Supreme Court observed [p. 45a, n. 8], in *Caban v. Mohammed,* 441 U.S. 380, 394, n. 11 (1979), this Court noted that a newborn child was not involved. The same case also reserved whether a State is "barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." Id., at 394, n. 16.

In *Santosky v. Kramer,* 455 U.S. 745, 760, n. 10 (1982) however, this Court doubted that a parental right termination based on the best interests of the child could stand:

> "The Family Court Judge in the present case expressly refused to terminate petitioner's rights on a 'non-statutory, no-fault basis.' App. 22-29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See Quilloin v. Walcott, 434 U.S. 246, 255, 54 L Ed 2d 511, 98 S Ct 549 (1978) . . . "

Other state courts addressing the issue have held unconstitutional statutes permitting terminations without a showing of unfitness, abandonment, or substantial neglect. *In re J. P.,* 648 P.2d 1364, 1375[9] (Utah 1982); *In re Adoption of Baby Boy C.,* 644 P.2d 150 (Wash.App. 1982). Those are California's statutes—old and new versions—and they are invalid.

The question is squarely presented.

III. A CAPABLE PARENT WHO MANIFESTS SUBSTANTIAL PARENTAL INTEREST IS ENTITLED TO RETAIN HIS PARENTAL RIGHTS

Edward acted promptly and did everything he could to retain his parental rights and get custody—he still is. The courts agree that he should have been given custody at the original hearing, five months after Katie's birth. [pp. 2a, 12a, 18a, 24a, 34a, 49a] It may not be appropriate to give him custody now, immediately, but that is no reason to end parental rights or forbid contact.

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' "
>
> *Lehr v. Robertson, supra,* 463 U.S., at 261.

In *Stanley v. Illinois,* 405 U.S. 645, 657 (1972) and *Santosky v. Kramer,* 455 U.S. 745, 760, n. 10 (1982), this Court held that unwed fathers are entitled to a hearing to determine if they are capable parents who have manifested a significant parental interest.

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relation-

ship and make uniquely valuable contributions to the child's development."

Lehr v. Robertson, supra, 463 U.S., at 262.

At the least, to terminate rights, there ought to be a finding there was no significant relationship *and* that the father was not prevented from forming such a relationship. See, White, J., dissenting, *Lehr v. Robertson, supra,* 463 U.S., at 271, n. 3.

Edward was prevented from any relationship by the mother and the state agency, the adoption department. He proved he is a capable parents and showed significant interest by seeking custody—total responsibility. Still, he lost *all* parental rights. His parental opportunity was denied despite carrying all his burdens of proof.

The issue is squarely raised.

CONCLUSION

Reserved and significant issues are squarely presented. The California Supreme Court refused to address them until this Court does so expressly, but the statute was held valid. The new statute is even more directly a "best interests" test. Probable jurisdiction should be noted.

Respectfully submitted,

James E. Sutherland
Counsel for Appellant

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CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BABY GIRL M., a Minor COUNTY OF SAN DIEGO, etc.,	)	
Petitioner and Respondent,	)	D003076
v.	)	(Super. Ct. No. A24905)
EDWARD M.,	)	
Respondent and Appellant.	)	(Filed April 30, 1987)

APPEAL from a judgment of the Superior Court of San Diego County, Judith McConnell, Judge. Affirmed.

Joseph D'Addario for Respondent and Appellant.

Lloyd M. Harmon, Jr., County Counsel, Daniel J. Wallace and Arlene Prater, Deputy County Counsel for Petitioner and Respondent.

Lee W. Selvig for Amicus Curiae.

Edward M. appeals from a judgment terminating his parental rights with respect to his five-year-old daughter, Katie. This is our second view of the case. Since our last exposure, it has been the subject of a divided decision by the state Supreme Court and reevaluated by the trial court under a new legal standard. In addition, recent legislation has endeavored to overrule the effect of the Supreme Court decision.

The emotionally charged issue which lies at the heart of this case thus is not presented to use in a pristine fashion. Katie, Edward and the prospective adoptive parents who have cared for Katie since she was five weeks old appear as pawns caught in a web of changing legal standards and an excruciatingly slow appellate process. The question before us is whether Edward, concededly fit to care for Katie, can nonetheless be denied the opportunity to develop parental ties and obtain custody because of the detriment Katie would suffer if she were removed from the custody of the prospective adoptive parents. Any resolution of this issue would in some sense be unfair. It is only because of the operative legal standards focus on the *child's* welfare that we can affirm the trial court judgment terminating Edward's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Edward's relationship with Katie's mother ended in November 1980 when neither party knew of the pregnancy. Soon after Katie's birth on July 18, 1981, the mother requested and received adoption assistance and placed Katie in a foster home. The mother never told Edward she was pregnant, and he first learned of the birth on August 1, 1981. He contacted the county Department of Social Services and met with a social worker on August 5. Although he did not request custody, Edward asked that Katie be placed with the family then provided day care for his sons. Later that day, the mother rejected Edward's placement request and formally relinquished Katie for adoption, explaining that she wished the child placed with a family unknown to either her or Edward.

The petition to terminate Edward's parental rights pursuant to Civil Code section 7017[1] was filed August 10, 1981. On that date Edward again met with the social worker and discovered the mother had relinquished Katie for adoption. He expressed fear he would be unable to see his child and arranged to visit her. The visit took place August 17, and Edward then specifically requested custody. Despite his wishes, Katie was placed in the "pre-adoptive" home of Pamela and Robert Moses on August 24, 1981, where she has remained to this date.

At the December 1981 hearing on the section 7017 petition, the trial court found that Edward was "a good parent [who] can provide a good, loving home for this child." Nonetheless, applying the "best interests of the child" test, the court concluded Edward's parental rights should be terminated so that Katie could remain with the prospective adoptive parents. There was no finding by the court that it would be detrimental to Katie if custody were awarded to Edward. The case was appealed, and on October 22, 1984, the California Supreme Court reversed and remanded, holding section 4600 applies to all termination of parentage proceedings under section 7017, subdivision (d). (See *In re Baby Girl M.* (1984) 37 Cal.3d 65.) Consequently the trial court was required to find both "that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child." (§ 4600, subd. (c).)

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[1]All statutory references are to the Civil Code unless otherwise specified. When referring to statutory subparts, we omit repetition of the word "subdivision."

In its opinion the Supreme Court concluded:

"We have held the trial court erred by applying the best-interests-of-the-child standard without first determining whether granting custody to the natural father would be detrimental. A review of the evidence introduced at the hearing indicates a finding of detriment would have been unsupportable *at that time*. However, concerned, as we must be, with the child's welfare and because of the passage of time, we recognize further evidence will be necessary.[12]" (37 Cal.3d at pp. 75-76.)

Footnote 12 then provides as follows: "We recognize the dilemma arising under the present fact situation. The state has placed the child with prospective adoptive parents pending resolution of Edward's claims; *strong relationships have developed, and breaking those bonds could be harmful to the child.*" (*Ibid.*, emphasis added.)

The trial court defined its duty upon remand and ruled in relevant part:

"My job as I understand it, is to determine whether an award of custody of this child to her parent, the father, [Edward M.], would be detrimental to her.

"And the evidence that I have before me consists of, first of all, the testimony and report of Dr. Nelson, who is an experienced, board-certified child psychiatrist, familiar with problems that children encounter when they suffer separation.

"And his opinion was that removal of Katie from the only home that she's ever known would cause extreme psychological and emotional harm to her.

"He found her to be a bright, happy, well-adjusted child, who would suffer profoundly if she were removed from the Moses home.

"Furthermore, it is likely, in his opinion, that she would become depressed and sensitized to future loss, and vulnerable to mental illness later in life.

"Dr. Nelson further stated that even with a slow removal from the Moses home, the child would suffer less harm ostensibly, but the trauma would still be great, and she would still suffer detriment as great as with a sudden removal. It would just be prolonged over a longer period of time.

"The other evidence I have on the subject of detriment is the evidence of Dr. Lamson. Frankly, her testimony carries less weight, both because of her lesser qualifications vis-a-vis Dr. Nelson, but also because of her lack of familiarity with the participants.

"But I would like to note a couple of things from her testimony. She testified that there would certainly be trauma to Katie— and I think those are her exact words—to be removed from the Moses home; and there could be permanent detriment.

"She also said the trauma would be great here because the child would lose the two parents that she has known virtually since birth, and they could be replaced by a man who is a stranger to her.

"In other words, she did not disagree with the testimony given by Dr. Nelson.

"I find the evidence is clear and convincing and, in fact, uncontradicted that Katie would suffer extreme emotional and psychological harm should she be removed from the Moses home, and this harm constitutes detriment within the meaning of Civil Code 4600.

"I find that it would be in the best interest of the child that custody be awarded to Mr. and Mrs. Moses, who are in almost every sense the true parents of this child.

"They've indicated that they will include [Edward M.] in Katie's extended family, and I encourage them to do so.

"The petition under 7017 is granted."

As of the February 1985 hearing after remand from the Supreme Court, the Moseses were in a very good marital relationship between a competent, willing and intelligent woman and a successful, energetic man, both of whom demonstrated concern with caring for each other and their children, a six-year-old adopted son and three and one-half year old Katie. No question is raised as to their suitability as parents.

No evidence presented at the February 1985 hearing detracts from the original finding that Edward is a good parent who can provide a good, loving home for Katie. Edward's personal circumstances have changed in terms of his no longer having full-time custody of his two sons by a former marriage and his living arrangements. The sons are in Northern California in the custody of their mother who has remarried. He lives with his parents in a three-bedroom condominium and is a licensed contractor steadily employed as a cost estimator for a general contractor.

DISCUSSION

The issue presented to us is whether the trial court's finding of detriment can be sustained where there is no evidence of Edward's inability to care for Katie and the finding is based solely on the psychological harm to Katie which would result if she were removed from the Moses home. Concededly, the record firmly supports the trial court's factual determination as to the existence of such harm,[2] hardly surprising in view of the consistent con-

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[2]Although I agree with many of the concerns expressed in Justice Work's thoughtful concurring opinion, it appears to me

(Continued on following page)

clusions reached by child development and psychology professionals regarding the extent of personality and value structure development achieved by children during the first five years of life. (See e.g., The Comprehensive Textbook of Psychiatry (Kaplan & Sadock, eds.) (4th ed. 1985) ch. 39.1, p. 1722; Developmental Psychology Today (1971) ch. 13, p. 225, 236.) The sole legal question for use to resolve is whether the court's finding of detriment can be sustained in the absence of some additional evidence of Edward's inability as a father. Resolution of this question requires our examination of the Supreme Court's earlier opinion in this case as well as its later decision in *Michael U. v. Jamie B., supra,* 39 Cal.3d 787.

When it remanded this case to the trial court, the Supreme Court expressly contemplated that the trial judge would consider whether three and one-half year old Katie would suffer psychological harm as a result of being taken away from the only parents she has ever known.[3] Foot-

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(Continued from previous page)

that consideration of the constitutional issue is necessarily foreclosed by the Supreme Court's *Baby Girl M.* opinion. That court's extensive citation to the Buchanan article (see Buchanan, *The Constitutional Rights of Unwed Fathers After Lehr v. Robertson* (1984) 45 Ohio St. L.J. 313) and federal precedent makes clear that it was aware of and considered the federal constitutional issue. The Supreme Court would not have remanded the case to the trial court for application of the detriment standard based on later-developing facts (see 37 Cal.3d at pp. 75-76) if consideration of those facts was constitutionally inappropriate because they were the product of state action in violation of Edward's fundamental parental rights. In my view, our position in the judicial hierarchy (see *Auto Equity Sales, Inc. v Superior Court* (1962) 57 Cal.2d 450, 455) precludes consideration of Edward's constitutional argument.

[3]Now, more than two years later, the harm to Katie would if anything be greater were she to be separated from the Moses.

note 12, (quoted *ante*, p. 5) indicates that additional evidence would be necessary on this issue. Moreover, nothing in the Supreme Court's opinion suggests that the psychological harm identified in footnote 12 would be insufficient in itself to sustain a finding of detriment on remand.

Edward argues that "detriment" under section 4600 requires some negative evidence regarding the father, evidence which is admittedly lacking in this case. He relies in part on *Michael U. v. Jamie B., supra,* 39 Cal.3d 787, in which a spintered Supreme Court attempted to apply its *Baby Girl M.* decision.

Michael U. involved the parental rights of a 16-year-old father who had sought custody of his son, Eric, after the 12-year-old mother had placed Eric for adoption. Of the five justices concurring in the judgment, Justices Mosk, Lucas and Kaus—two of them were dissenters in *Baby Girl M.*—restate their opposition to the "detriment" standard and preference for the "best interests of the child" test, which of course the test originally applied by the trial court in terminating Edward's parental rights in this case. (39 Cal.3d at pp. 796-797.)

Justice Broussard's lead opinion joined by Justice Grodin attempts to apply the *Baby Girl M.* "detriment" standard and concludes that the evidence before the trial court compelled a conclusion that placement with Michael would be detrimental to Eric. In reaching this conclusion, the lead opinion describes Michael's lack of maturity and judgment but also relies on the psychological harm Eric would suffer if her were separated from his prospective parents. (*Id.* at p. 795.) The opinion explains the basis for such reliance:

> "Judicial decisions have recognized the harm to a child which results when he is removed from a stable home environment. (See *Marriage of Carney* (1979) 24 Cal.3d 725, 730-731 [157 Cal.Rptr. 383, 598 P.2d 36, 3 A.L.R. 4th 1028] and cases there cited.) In *Adoption of Michelle T.* (1975) 44 Cal.App.3d 699 [177 Cal. Rptr. 856, 84 A.L.R. 3d 654], the court took judicial notice of the book Beyond the Best Interests of the Child by Goldstein, Freud & Solnit (1973), which 'emphasizes the importance to a child of continuity of parental relationships. According to the authors, changes or interruptions in this relationship cause the child to regress "along the whole line of his affections, skills, achievements, and social adaption." (*Id.*, at p. 18) "Physical, emotional, intellectual, social and moral growth does not happen without causing the child inevitable internal difficulties. The stability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones" (*id.*, at p. 32).' (P. 706.) The court concluded with a quotation from *Williams v. Neumann* (Ky.App. 1966) 405 S.W.2d 556, 557: '"[A child] cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration and bewilderment.'" " (Id. at p. 795, fn.7.)

It is true that under the facts of *Michael U.*, there was evidence both of Michael's inability to accept the responsibilities of parenting and of the psychological harm Eric would suffer if he were separated from the prospective adoptive parents. Given those facts, of course, there is every reason for the lead opinion to discuss *both* factors in resolving the case. One searches in vain, however, for any indication that negative evidence regarding the father

is a necessary predicate to a finding of detriment.[4] In fact, just the opposite conclusion is manifest in footnote 8, in which the opinion distinguishes "detriment" from the concept of "unfitness," a finding of which is necessary to remove a child from the custody of a parent. "It is presumably detrimental to a child to award custody to a parent who is so unfit that the state might have to intervene to retrieve custody, but it might also be detrimental to place him with a parent who is not unfit, depending upon the child's current circumstances and the available placement alternatives. (*In re Reyna* [(1976)] 55 Cal.App.3d [288,] 302-303.)" (39 Cal.3d at p. 796, fn 8.) Significantly, "the child's current circumstances and available placement alternatives" are precisely the factors relied on by the trial court here in refusing to award custody of Katie to Edward. In fact, those two factors could not conceivably *include* negative information about the father's parenting abilities. Thus, all five of the concurring justices in *Michael U.* clearly expressed their view that harm resulting from the separation of the child and the prospective adoptive parents *in and of itself* can constitute "detriment" sufficient to support the termination of parental rights under section 7017.

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[4]Moreover, the time period involved in this case makes the issue not merely different in degree but also different in kind. Eric was seven months old at the time of the initial hearing in *Michael U.* and had lived with his prospective adoptive parents since the age of two months. He was two and one-half years old when the Supreme Court filed its opinion. In contrast, Katie was three and one-half years old at the time of the trial court hearing under review here and has now passed her fifth birthday. To suggest it would not be "detrimental" to uproot a five-year-old from the only home she has ever known eviscerates the common meaning of the word.

This conclusion is further supported by Justice Broussard's citation to *In re Reyna* (1976) 55 Cal.App.3d 288 which, like the present case, involved a natural father attempting to obtain custody after the child had been placed with prospective adoptive parents. The child was just over one year old at the time of the Court of Appeal decision. Anticipating the Supreme Court's *Baby Girl M.* decision, the *Reyna* court held that section 4600 required the trial court to make a finding that placement of the child with the father "*would be detrimental to the child*" (55 Cal.App.3d at p. 296, emphasis in original). It then commented on the proper application of this standard:

> "[I]n furtherance of the legislative purpose of placing the best interests of the child ahead of a parent's rights, even though a father is found to be fit in the usual sense, he nonetheless will be denied custody if it is shown that it would be harmful to place the child with him. [Citation.] For example, if it is shown that it would be emotionally and psychologically harmful to uproot the child from the care and love of the nonparents with whom it has been living for a substantial period of time and place it with the father with whom it has never had contact, then custody must remain with the nonparents." (*Id.* at p. 302.)

In sum, the rule to be distilled from *Baby Girl M.* as interpreted by *Michael U.* is that the "detriment" standard of section 4600 precludes the trial court from merely comparing the father with the prospective adoptive parents and choosing the placement which the court believes is best. This standard has the salutary effect of avoiding placements perfunctorily based on "objective" criteria such as income or social status. But where there is demonstrable harm to the child if he or she is placed with the parent—regardless of whether such harm is attributable to

the parent's "fault"—that placement is "detrimental" within the meaning of section 4600 and an alternative placement with nonparents is appropriate.[5]

We have previously alluded to the difficulty of this case, due in large part to the fact that Edward appears to have done everything he reasonably could have to establish a parent-child relationship with Katie. He was frustrated by the existence of legal standards in a state of flux and a not-sufficiently sensitive bureaucracy. But while the rights of parents are important, our society is committed to the judgment that the interests of children predominate. The function of the judicial system in these matters is not to punish insensitive bureaucracies but to assess the effect of placement alternatives on children.[6]

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[5]The book *Beyond the Best Interests of the Child* has become a standard reference in this intractable area of the law. (See e.g., *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 795, fn. 7; *In re Angelia P.* (1981) 28 Cal.3d 908, 917; *Adoption of Michelle T.* (1975) 44 Cal.3d 699, 706.) The authors distinguish between biological parents and "psychological parents" in the following terms:

> "[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his 'psychological parent' in whose care the child can feel valued and 'wanted.' An absent biological parent will remain, or tend to become, a stranger." (Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (1973) p. 17.)

[6]As the court stated in *In re Reyna, supra,* 55 Cal.App.3d at p. 304:

> "[David] argues that constitutionally he must be accorded the same rights as a married father and that, if he had been

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It is of some solace to us, although probably none to Edward, that this case is sui generis. That it has taken over five years to resolve is due principally to the fact that it served as the vehicle to clarify the governing legal standard. Moreover, the Legislature has responded to the Supreme Court's *Baby Girl M.* decision by amending section 7017.[7] By specifying the "best interests" test as the only

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> afforded a hearing promptly after the child's birth, he would have received custody because detriment to the child could not have been shown that early in the child's life. [¶] While it is most unfortunate for David that the agency acted in a precipitous manner without careful investigation as to his whereabouts, we cannot unwind the clock and simply award custody to David because of the agency's misjudgment 11 months ago. To do so would be to disregard the best interests of the child as mandated by section 4600."

[7]Subdivision (d)(2) of section 7017 now reads in relevant part:

> "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that that person's consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. Section 4600 does not apply to this proceeding. . . ."

applicable standard, this amendment effectively overrules *Baby Girl M.* The Legislature's specific direction for trial courts to consider "the age and prior placement of the child, and the effects of a change of placement . . ." confirm that the result reached by the trial court in this case is consistent with legislative intent. By adopting the interpretation of "detriment" as we do here, we minimize the disruption which can be occasioned by changing and uncertain legal standards.

DISPOSITION

Judgment affirmed. The County shall bear the costs of this appeal.

CERTIFIED FOR PUBLICATION.

/s/ WIENER, Acting P. J.

WORK, J., concurring:

Although I concur, I am disturbed by the extent of the governmental involvement in creating the unfortunate scenario which now directs this result. As I perceive the law, had the juvenile court recognized the fundamental rights of biological parents and children summarized below, it would now be unnecessary to attempt to interpret the majority holding in *In re Baby Girl M.* (1984) 37 Cal.3d 65, as to the meaning of "detriment".[1] However, the issue of state involvement was never raised by the parties and only recently addressed by way of supplemental briefing at our request. The extent of state involvement is a pivotal concern in any contested parental rights termination case involving a fit, capable and willing parent, and, except for the certainty of permanent emotional harm should Baby Girl M. (Katie) now be removed from the family of which she has been a member for six years, would mandate a different result.[2]

Most reported cases reviewing Civil Code[3] section 7017 proceedings, in which a natural father contests sever-

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[1]It is especially ironic that Edward's position was worsened by the California Supreme Court's taking the case and resolving an issue favorably to him. In effect, the majority holding in *Baby Girl M.* on the question of Civil Code section 4600 standards tracks the result we originally reached two and one-half years ago. Had this court's prior opinion remained undisturbed, Edward would have had a presumed father status long ago and the child undoubtedly would have adjusted satisfactorily.

[2]I do not agree with the conclusion in the lead opinion suggesting the remand from the Supreme Court should be interpreted as a holding on this constitutional issue. A plain reading of the Supreme Court's decision shows this issue was neither actually presented nor determined by the court. (See *People v. Shuey* (1975) 13 Cal.3d 835, 842.)

[3]All statutory references are to the Civil Code.

ing of his parental ties, are private litigations pitting those wishing to adopt against the father. Of significance, this was the case in *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787. Thus, in those cases, the state involvement was at most minimal and indirect. In stark contrast here, it is San Diego County directly withholding custody from a capable biological father, while choreographing the tableaux to be viewed by the juvenile court in court proceedings in which it is the party opposing that father. It is the County which removed Baby Girl M. from temporary placement *after* her father requested custody. The County successfully relied on the bonding to the adoptive family, which it artificially created, to convince the juvenile court initially, and us now, that the emotional harm to Katie from being returned to her real father prevents us from doing so.[4] However, the unsatisfactory result in this case should be prevented in the future by strict adherence to constitutional principles recognizing a biological father's right to develop his parenting interest is paramount to the interests of all except the child's mother.

As a general proposition, a parental rights termination proceeding interferes with a natural parent's fundamental liberty interest. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753-754; *Quilloin v. Walcott* (1978) 434 U.S. 246, 255.) Further, an unwed father has a constitutionally-protected, special, opportunity interest to *establish* a familial relationship with his child. (*Lehr v. Robertson* (1983) 463 U.S. 248, 262.)

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[4]I do not mean to suggest the County's continued litigation is legally improper. It is expressly permitted to be a party to these proceedings by section 7017.

While *Santosky* involved proceedings to sever ties of parents who had established a custodial family relationship, in *Quilloin* the unwed father had never been involved in the child's family life after birth. In *Lehr,* where the biological father waited until the child was two-years old and after a stepparent adoption petition had been filed, the court's concern was to determine whether the State had adequately protected his opportunity to form such a relationship. In upholding New York's notice requirements, the court stressed the father's inability to take the child into his own home was due solely to the custodial mother's activities *with no interference by the State.* (*Id.* at pp. 262-263.) Moreover, the stepparent adoption proceeding *Lehr* reviewed only maintained the custodial status quo in the mother and stepfather. However, *Lehr* suggests a natural father may lose constitutional protection for his parenting rights if he fails to grasp the opportunity when presented. (*Id.* at p. 262.)

In *In re Baby Girl M., supra,* 37 Cal.3d at pages 74-75, the majority opinion refers to an analysis of federal decisional law which concludes "the state may not deny biological parents the opportunity to establish a protected custodial relationship". (Buchanan, *The Constitutional Rights of Unwed Fathers Before and After, Lehr v. Robertson* (1984) 45 Ohio State L.J. 313, 351.) However, the court did not address this issue nor the significance of the fact that once her mother formally relinquished Katie to the County agency, it was solely the County's action and decisions which barred Edward from exercising parental control in the first instance and which permitted his child to become bonded to third parties so as to create the sole relevant factor we now use to justify terminating his par-

ental rights. It is this element alone which provides clear and convincing evidence that at this late date severing parental ties is in the child's best interest and satisfies the detriment finding.

Thus, Edward has been caught in the jaws of that trap recognized by the United States Supreme Court where the State has prevailed because of its "unusual ability to structure the evidence" and "power to shape the historical events that form the basis for termination." (*Santosky v. Kramer, supra,* 455 U.S. at p. 763, fn. 13.) From this snare, Edward, a willing, capable and loving parent has been unable to extricate himself in spite of prompt and persistent application to the courts.

I am not so certain, as the author of the lead opinion, that Edward's dilemma is sui generis, although this appears to be the only reported California or federal case with these precise facts. Four years before the section 7017 petition was filed in this case, we directed this same County agency to the following proposition:

> "'The importance of the adoption system in providing secure and loving home environments for children whose natural parents cannot or do not wish to raise them is obvious. However, in our rush to ensure the stability and efficiency of the adoption process, it is apparent that the rights of the parties involved—particularly the unwed father—may well suffer. It may be instructive in this regard to consider the growing awareness of adopted children who have undertaken to search for their "real" parents in an attempt to discover their familial roots. Would it not be fairer to all of the parties in an adoption proceeding to ensure that the rights of the putative father who wants to assume custody of his child and is adjudged qualified to do so are protected? After all, it makes no more sense

> to insist that all unwed fathers are disinterested and unfit parents than it does to continue in the belief that all mothers are by nature interested in raising children.
>
> 'It is to be hoped that courts will weigh these considerations in determining adoption issues!'" (*In re Tricia M.* (1977) 74 Cal.App.3d 125, 135, quoting 28 Hastings L.J. 221-222.)

Further, although the County assures us its policies now would lead it to handle a similar situation in a different manner, it continues to argue it was justified in denying Katie her opportunity to be legitimated and reared by her natural father and extended biological family.

While now conceding Edward had a constitutional right to develop an opportunity interest, the County claims its actions in 1981 were appropriate for two reasons. First, it argues its *parens patriae* role elevates its interest in determining suitable placement for a child over that of every natural father, even a capable, willing parent who has come forward before any meaningful third-party bonding is established and after the mother has legally abandoned her superior interest through relinquishment. (See *Adoption of Boy D.* (1984) 159 Cal.App.3d 8, 21.) The County cites no legal authority for this position and it defies reason and legal precedent that it can justify withholding custody from, let alone sever parental rights of, a natural parent of a month-old child who is in temporary placement merely because the other parent has relinquished the child to its control. Indeed, if mere relinquishment gave the State a paramount interest to a fit and proper natural father who has not forfeited the constitutional protection for his opportunity interest, there would be no reason to require the State to prove by clear and convincing evidence that it is

in the child's best interest not to be placed with a biological father. The County's *parens patriae* goal is to provide the child wtih a suitable permanent home. (*Santosky v. Kramer, supra,* 455 U.S. at p. 745.) The State registers no gain toward its declared goals when it separates children from the custody of fit parents. (*Id.* at p. 767, quoting *Stanley v. Illinois* (1972) 405 U.S. 645, 652.) Nor, I am certain, does it benefit society or the children the State is supposed to protect by denying a child the right to be legitimated by a loving, capable and willing biological father. The State's goal is only realized when the natural parent cannot or will not provide a normal family home.

Although here the County has the power to sever Edward's parental ties under the provisions of section 7017, it certainly cannot justify doing so to provide Katie with a fit home she would not otherwise have. While the County has a legitimate interest in severing parental ties when to do so is necessary to provide a child with family relationships not otherwise available, it has no legally recognizable interest in denying such a relationship to develop between the child and biological father under the facts of this case as they existed in 1981.

Certainly, section 7017 is a logical response to a very real problem in our society. When children are relinquished for adoption or because of parental unfitness are deemed permanently unlikely to be suitably reunited with parents, their very helplessness requires the State to act in their best interest. Obviously, in those situations, assimilating the children into stable family environments through the adoptive process is the most palatable solution. However, adoption with all its benefits is, at best, a prosthesis which should be used only when the biological

family cannot or should not be maintained. The prosthetic benefits of replacing a diseased or defective hip socket with steel or plastic is undeniable. To replace a perfectly healthy, well functioning socket with an equally useful prosthesis, however, is unjustified. The State's surgically-equivalent intervention here cannot be condoned.

The second justification raised by the County is that Edward failed to grasp his opportunity interest quickly enough. Yet the child was placed in its custody two weeks before Edward learned of her birth. He expressed his interest in custody only 17 days later, and one week before the County placed the child for permanent adoption.

The County's timeliness argument is predicated on several factors. First, that Edward forfeited his opportunity interest, because he did not maintain contact with the mother after their three-month relationship terminated to see if she might have been impregnated. Although the evidence shows that neither parent anticipated this result of their liaison, it is significant the mother desired to keep Edward unaware of her pregnancy and managed to do so, only alerting him more than a week after she had placed Katie with the County. In any event, Edward's knowledge of the pregnancy, even coupled with his possibly reestablishing a relationship with the mother *before* the birth, would not place him in a less vulnerable position here. One cannot become a "presumed" father short of marriage, a status the mother eschewed, or by the father taking the child into his family home *after* birth, an eventuality the mother forestalled for three weeks and the County has made impossible for six years. (§ 7004.) Because a natural father's opportunity interest is to allow him the

chance to establish a family relationship equivalent to that of a presumed father, short of marriage that can only be accomplished after the birth of a child.

A second justification put forward by the County is Edward's initial reluctance to ask for custody, suggesting instead the child be adopted or placed in a foster home with persons of his choice. Whatever his initial disposition, Edward's commitment to rearing his daughter was stated and has been firmly held from the time she was one-month old, before the child was removed from the County's adoptive pool and placed in a permanent setting and before bonding. Not only does the County fail to suggest any practical significance of the two-week delay in Edward's final decision, it does not even hint that an immediate request for custody would have altered its course. In light of the County's position in 1981, and now, contending its rights are paramount to those of any natural father, Edward's two-week delay cannot justify the County's position.

Discussing a fact situation similar to ours, Buchanan states:

> "Thus, the constitutional conclusion that a fit biological father . . . has a right to take on responsibility for his child *itself* prevents a state determination that children like [his] child are to be given into the care of those people whom the state considers best qualified." (*Buchanan, supra,* 45 Ohio State L.J. at p. 381.)

To the extent the State may have unconstitutionally deprived Edward of his opportunity to take responsibility for his child, he may have other remedies. (See *id.* at pp. 377-378, fn. 486.) However, the substantial degree of permanent emotional harm in removing Katie from her family of six years and preventing her legal legitimation within it is compelling on this record. Although I find the County's actions in barring Edward and his child from developing a normal biological family relationship legally unjustified, I reluctantly conclude time and circumstances require affirming the judgment dispensing with his consent for adoption.

CERTIFIED FOR PUBLICATION.

/s/ WORK, J.

I respectfully dissent.

In my view, under the facts, the law of the case (*In re Baby Girl M.* (1984) 37 Cal.3d 65), precedent and applicable constitutional principles forming the basis of the parental preference doctrine, a finding that an award of custody to the natural father would be detrimental to the child cannot properly be upheld where the father is found to be " 'a good parent [who] can provide a good, loving home for this child' " (*id.* at p. 68) and the detriment is based solely on evidence of harm to the child that would be caused by her removal from the only home she has ever known, the home of the prospective adoptive parents with whom the child was placed approximately five weeks after her birth. I would reverse with directions to the trial court to consider any evidence of additional circumstances bearing on the best interests of Katie and detriment in placing her with Edward that may have developed during the pendency of this appeal since February 1985 (see *In re Baby Girl M., supra,* 37 Cal.3d at pp. 75-76), and in the absence of substantial evidence of traits or circumstances personal to Edward that would support a conclusion of detriment, I would order the petition dismissed and custody awarded to Edward.

In re Baby Girl M. states in part:

> "The actions of *both* [italics in orig.] parents after the birth of their child determine their ability to accept parental responsibility. An unwed mother may have had no more desire to conceive or knowledge of the conception than the unwed father. Nevertheless she is given a choice to keep or relinquish the child because she gave birth. *Her decision to release the child for adoption should not deprive the father of a meaningful opportunity to retain and develop —his relationship* [italics added].
>
> "A natural father may not have *initial* custodial or veto rights equal to those of a presumed father. However, both classes of fathers share the same *burdens* of support for the child and liability for the reasonable expenses of the mother's pregnancy and confinement. (§§ 7010 and 7012.) Thus when the natural father's rights *do* arise, upon relinquishment by the mother, and he claims custody at a section 7017 hearing, an additional finding of detriment is neceessary to terminate his parental rights.
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> "V
>
> "We have held the trial court erred by applying the best-interests-of-the-child standard without first determining whether granting custody to the natural father would be detrimental. *A review of the evidence introduced at the hearing indicates a finding of detriment would have been unsupportable* [italics added] *at that time* [italics in orig.]. However, concerned, as we must be, with the child's welfare and because of the passage of time, we recognize further evidence will be necessary.[12]" (37 Cal.3d at pp. 75-76.)

Footnote 12 of the quoted passage provides: "We recognize the dilemma arising under the present fact situation. The state has placed the child with prospective adoptive parents pending resolution of Edward's claims; *strong relationships have developed, and breaking those bonds could be harmful to the child.*" (*Ibid.,* italics added.)

On this record there are no "actions" of Edward after the birth of Katie that are adversely determinative of his "ability to accept parental responsibility." (37 Cal.3d at p. 75.) The effect of an affirmance of the trial court's

judgment based on no acts of Edward himself is to allow the mother's decision releasing Katie for adoption to deprive Edward of a "meaningful opportunity to retain and develop his relationship." (*Ibid.*) This effect is contrary to the express language of *In re Baby Girl M.*

The parental preference doctrine is set forth by the United States Supreme Court and the California Supreme Court, respectively, as follows:

> "The rights to conceive and to raise one's children have been deemed 'essential,' [citation], 'basic civil rights of man,' [citation], and '[r]ights far more precious . . . than property rights' [citation]. 'It is cardinal with us that the custody, care and nurture of the child reside *first* in the parents . . . .'" (*Stanley v. Illinois* (1972) 405 U.S. 645, 651 [92 S.Ct. 1208, 1212], italics added.)

"[A] court *must* award physical custody of a minor to a parent, if fit to exercise custody, as against a stranger." (*In re B. G.* (1974) 11 Cal.3d 679, 693-694, fn. omitted, italics added.) This statement of the parental preferences rule was modified by the enactment of Civil Code[1] section 4600, part of the Family Law Act. The parental preference doctrine, *In re B. G.* points out:

> "embodied both a requirement that a custody order in favor of a nonparent rest upon a finding of parental unfitness, and the limitation that such an order would be made only in extreme cases. The enactment of section 4600 changes the former principle, and focuses attention not on the unfitness of the parent but the detriment to the child. [Citation.] The Legislature

[1]All statutory references are to the Civil Code unless otherwise specified.

> did not, however, intend to disturb the judicial practice of awarding custody to nonparents in preference to parents only in unusual and extreme cases. [Citation.]
>
> "As enacted, section 4600 expressly recognizes that custody should be awarded to parents in preference to nonparents. . . . [I]n a dispute between a parent and a nonparent, the section imposes the additional stipulation that an award to the nonparent requires a finding that 'an award of custody to a parent would be detrimental to the child.'" (*In re B. G., supra,* 11 Cal.3d 679, 698.[2])

[2]Before reaching this conclusion, *In re B. G.* noted the detriment standard reflects a concern the Legislature shared that without the standard a change in custody would be permitted "'merely because a subjective conclusion is reached that the child's interests will be better served somewhere else than with his parents and without any decision that the home of the parent would *not* be good for him.'" (11 Cal.3d at p. 697.)

In re B. G. also quoted at length from a report of the Assembly Judiciary Committee, stating reasons for the detriment standard as follows: "'Limitation of the power of the court to award custody of children to persons other than a parent is the primary intent of the provisions in the new act relating to child custody. Effort was made to avoid a *Painter* v. *Bannister* [258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966)] situation in California. In that case, an Iowa court awarded custody to Iowa grandparents of a young boy who had been temporarily living with them with the permission of his father after the accidental death of his mother. The court disapproved of the 'Bohemian' mode of living and intellectuality of the photographer father, a California resident, despite evidence that the father cared greatly for the child, was regularly employed and relatively successful, had remarried and would provide a stable environment. The court reasoned that Iowa farm life would be better for the interests of the child. . . .

"'[B]efore custody can be awarded to one other than a parent, the court must specifically find that an award of custody to a parent would be detrimental to the child, and that the award

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Since *In re B. G., supra,* 11 Cal.3d 679, it has been said:

> "The doctrine of parental preference in custody matters is an established right of constitutional magnitude. . . .
>
> " . . .
>
> "[A natural father's] rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, mandate the application of the parental preference doctrine to the instant [§ 7017] proceeding. [Citations.]" (*Adoption of Baby Boy D.* (1984) 159 Cal.App.3d 8, 21-22.)

It was in furtherance of this parental preference doctrine that the California Supreme Court decided the law of this case, holding that in section 7017 termination of parentage proceedings it is error if the trial court finds it is in the best interests of the child to remain with the prospective adoptive parents without first finding that an award of custody to the natural parent would be detrimental to the child.[3] The California Supreme Court also pointed out that on the basis of the record before it, a finding of detriment would have been unsupportable at

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to a nonparent is required to serve the best interests of the child. What is "detrimental" had not been set forth with particularity. It is a nearly impossible task to devise detailed standards which will leave the courts sufficient flexibility to make the proper judgment in all circumstances . . . *The important point is that the intent of the Legislature is that the court consider parental custody to be highly preferable. Parental custody must be clearly detrimental to the child before custody can be awarded to a nonparent.'* (4 Assem. J. (1969 Reg. Sess.) pp. 8060-8061.) (Italics added.)" (11 Cal.3d at pp. 697-698.)

[3]Section 4600, including its requirement of a finding of detriment, no longer applies to section 7017 proceedings.

the time of the original hearing in December 1981. (*In re Baby Girl M., supra,* 37 Cal.3d at p. 75.)

In the context of the parental preference doctrine, I believe there still is not substantial evidence supporting a finding of detriment. There must be evidence of something wrong with the natural parent personally or with his or her circumstances that would detrimentally impact on the child before a finding of detriment can be supported. Here, of course, there is nothing wrong with Edward. The evidence is to the contrary and an affirmative finding of his good capability as a parent has been made. Thus, I believe the finding of detriment cannot be sustained.

Support for this conclusion is found in my analyses of the justices' opinions in the case *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, decided after the trial court ruled in the present case. *Michael U.* involved a section 7017 proceeding in which Michael, the father claiming custody, was 16 years old when the child, Eric, was conceived by Jamie, a 12-year-old who relinquished Eric for adoption. Eric was placed with prospective adoptive parents, the Whites. The essential finding of the trial court was that an award of custody to Michael would not be detrimental to Eric. Examining characteristics personal to the father that showed placing custody in him would be detrimental, a majority of the Supreme Court reversed for lack of substantial evidence to support the trial court's determination to the contrary.

There is no majority opinion in *Michael U.*, but four of the five justices concurring in the judgment as well as the two dissenting justices reveal in their opinions that an examination of the traits and circumstances of the natural

father is called for in order to have substantial evidence of the detriment element. The lead opinion, concurred in by one justice, focuses on facts showing the father's poor judgment and lack of maturity, including acts of juvenile delinquency, serious academic difficulties, disciplinary problems, youth, unemployed status, inexperience at "fathering" and plan to have the child cared for by the father's mother, a plan which might make necessary another change of custody. In its analysis of the evidence of detriment, the lead opinion briefly noted the suitability as parents of the prospective adoptive parents (39 Cal.3d at pp. 794-795) and it described the testimony of a child psychiatrist that removal from the home of the prospective adoptive parents would be detrimental, listing certain symptomology.

The lead opinion concludes its analysis:

> "If this case could be decided solely on the basis of the best interest of Eric, it would not be a close case. On this record we could not possibly justify taking Eric from the stable and loving home where he now lives. Michael, however, is entitled to the parental preference established by Civil Code section 4600, and to custody unless such an award would be detrimental to the child.
>
> "Even under this higher standard, however, we conclude that under the undisputed evidence we should reject the trial court's award of custody to Michael. Michael was an unemployed high school student whose social and sexual relationships and academic record demonstrate his lack of maturity and judgment. His ability to care for the child himself was open to question. We recognize that at the time of trial Michael was living with his family in an established and loving family relationship, but the award of custody is to

> Michael himself, and upon reaching majority he would be entitled to leave and take the child with him. Yet the act of changing custody would itself inflict serious harm on Eric, and if, as seems quite possible, Michael proves unable to care for Eric properly and further changes are required, that initial custody change would still have conferred on Michael a permanent right to veto any proposed adoption. We conclude that the implied finding that an award of custody to Michael would not be detrimental to Eric is not supported by substantial evidence, and that the court's order awarding Michael temporary custody of Eric was an abuse of discretion.[8]" (39 Cal.3d at pp. 795-796.)

In footnote 8, the lead opinion states:

> "We do not imply that Michael is 'unfit' in the sense that, if he received custody of Eric, the state would have grounds to intervene and remove the child. As the court explained in *In re Reyna, supra,* 55 Cal.App. 3d 288, 302, the concept of unfitness under Civil Code section 232 or Welfare and Institutions Code section 300 is distinct from the test of detriment under Civil Code section 4600. It is presumably detrimental to a child to award custody to a parent who is so unfit that the state might have to intervene to retrieve custody, but it might also be detrimental to place him with a parent who is not unfit, depending upon the child's current circumstances and the available placement alternatives. (*In re Reyna, supra,* 55 Cal.App.3d at pp. 302-303.)" (39 Cal.3d 796, fn. 8.)

Though believing that only a finding of best interests, not detriment, is necessary in section 7017 proceedings, one of the opinions concurring in the judgment, joined in by a second justice, states:

> "Interpreting the *Baby Girl M.* test, the same Court of Appeal justice who authorized that opinion for a

majority of this court concluded, in the Court of Appeal in this case, that it would *not* be detrimental to give custody of the infant to a 16-year-old biological father who was legally a rapist: as a juvenile delinquent who admittedly had sexual relations with a 12-year-old girl, the father could have been criminally prosecuted. (Pen. Code, § 261.5.) Apparently it now takes something more in a biological father than his attributes as an irresponsible and immature juvenile, a delinquent with no visible means of support and frequent criminal activity, to constitute circumstances detrimental to the well-being of an infant." (39 Cal. 3d at p. 797.)

Likewise, the two dissenting justices, viewing the record as containing substantial evidence supporting the implied finding an award of custody to Michael would not be detrimental to Eric, examine personal and circumstantial characteristics of Michael himself in reaching their conclusion. (39 Cal.3d at pp. 799-800.)

Inasmuch as six of the seven justices in *Michael U.* looked to features personal to the father in considering whether there is substantial evidence of detriment in the context of the parental preference doctrine, I believe evidence of that nature bearing on the issue is required before a finding of detriment can be sustained. No such evidence is present in this case. To the contrary, the father has been found to be a good parent who can provide a good, loving home for his child, and there is no evidence in the record of the 1985 hearing that would detract from or change this assessment of Edward's parenting ability. In

these circumstances a finding of detriment cannot be sustained.[4]

The question of the appropriate disposition of this case must be considered in the context of the parental preference doctrine. By August 10, 1987, the section 7017 proceeding will have been pending six years. Two evidentiary hearings and two appeals will have occurred in that time. The important human attachments and lack of attachments present in this case are inevitable incidents of this passage of time. During this time there has been no evidence of Edward's traits or circumstances that could be viewed as substantial evidence of any detriment to Katie in an award of her custody to him. The Department of Social Services has had ample opportunity to present any such evidence. Continued legal custody in the Department of Social Services (§ 224n, subd. (a)) no longer serves any constructive purpose. In my opinion, subject to a hearing limited to a consideration of evidence occurring after the February 1985 hearing that bears on the best interest and detriment issues, this is an exceptional case where there is no reason to prolong the proceeding by way of further hearings on the issues. (See

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[4]This conclusion should not be understood as expressing the view that the trial court was precluded from basing its decision in part upon evidence of detriment resulting from the breaking of bonds between the prospective adoptive parents and Katie. The Supreme Court, in the law of this case, invited the trial court to consider that sort of evidence of detriment. (*In re Baby Girl M., supra,* 37 Cal.3d 65, 76, & fn. 12—the court recognized "further evidence will be necessary" and in the footnote to this passage stated, in part, "breaking those bonds could be harmful to the child.") The evidence of detriment due to the separation of Katie from the prospective adoptive parents was properly considered by the trial court in this case.

In re B. G., supra, 11 Cal.3d 679, 699, "Only in an exceptional case, in which the record so strongly supported a party's claim to custody that a denial of that claim by the trial court would constitute an abuse of discretion may an appellate court itself decide who should be granted custody.")

In my view, subject to the limited hearing after remittitur, it is now time to award custody to Edward who is affirmatively shown by the evidence to be a capable parent, i.e., fit to exercise custody as against the prospective adoptive parents (*In re B. G., supra*, 11 Cal.3d 679, 693-694) and with respect to whom as a matter of constitutional law the custody, care and nurture of Katie first resides. (*Stanley v. Illinois, supra*, 405 U.S. 645, 651.) In this connection it is important to point out that at the February 1985 hearing, Edward recognized there would be some type of trauma to Katie in his taking custody but believed it could be minimized and made temporary. He proposed a gradual plan of reunification with involvement by the court, the prospective adoptive parents, the psychiatrist Dr. Nelson and the other children and adults in his life and the life of Katie. At oral argument on April 14, 1987, Edward reiterated his desire to engage in a gradual reunification plan. It is also worth noting that Katie is a normal, healthy, well-adjusted child. I would expect Edward to carry out a plan of gradual reunification along the lines outlined in the hearing so as to minimize the harshness on Katie as well as those around her from the award of custody to Edward.

CERTIFIED FOR PUBLICATION.

/s/ Lewis, J.

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

In re BABY GIRL M., a Minor	)	
	)	
COUNTY OF SAN DIEGO, etc.,	)	D003076
	)	
Petitioner and Respondent,	)	
	)	(Super Ct.
v.	)	No. A24905
	)	
EDWARD M.,	)	
	)	(Filed
Respondent and Appellant.	)	May 21, 1987)
	)	

ORDER MODIFYING OPINION

The lead opinion of Justice Wiener in this case, filed April 30, 1987, such that the sentence and citation which begins on page 7 and continues on page 8 should read:

> "Concededly, the record firmly supports the trial court's factual determination as to the existence of such harm,[2] hardly surprising in view of the consistent conclusions reached by child development and psychology professionals regarding the extent of personality and value structure development achieved by children during the first six years of life. (See generally, e.g., Developmental Psychology Today (1971) ch. 13, pp. 225, 236.)"

Footnote 2 remains unchanged,

/s/ Wiener
WIENER, Acting P.J.

In RE BABY GIRL M.
L.A. 31786

FILED
OCT 22 1984

We are asked to determine whether the trial court erred in terminating a natural father's parental rights by considering only the best interests of the child without first considering whether an award of custody to him would be detrimental to the child. We conclude Civil Code section 4600[1] is applicable to all section 7017, subdivision (d) termination proceedings and reverse the judgment.

I

Edward and Baby Girl M.'s mother dated during the fall of 1980. When the relationship ended in November, neither of them knew she was pregnant. Baby Girl M. was born on July 18, 1981. While in the hospital, the mother requested adoption assistance, met with a social worker, and placed the child in a foster home three days later. She had never informed Edward of the pregnancy and did not tell him of the birth until August 1, 1981.

Edward immediately contacted the San Diego Department of Social Welfare to determine his rights. He met with a social worker on August 5 and requested his daughter be placed with the family who was then providing day care for his sons. Later that day the mother formally relinquished the child for adoption and rejected Edward's placement request, stating she wished the child placed with a family neither of them knew.

On August 10 a section 7017 petition to terminate Edward's parental rights was filed. That same day Edward again met with the social worker, discovered the mother had relinquished the child for adoption, and expressed his fear he would be unable to see his child. He arranged to visit the child at the agency offices on August 17, at which time he specifically requested custody. Despite the father's wishes, Baby Girl M. was placed with the prospective adoptive parents on August 24.

At the section 7017 hearing in December, the court found Edward to be the biological father and "a good parent [who] can provide a good, loving home for this child." However, the court determined it was in the child's best interests to remain with the adoptive parents. Edward's parental rights were terminated without a finding it would be detrimental to the child to award him custody.

II

In 1976 the Uniform Parentage Act was enacted. (§§ 7000-7021.) One of its primary purposes, as well as that of several related statutes enacted simultaneously, was to eliminate the distinctions between legitimate and illegitimate children. To this end, the act declares the parent-child relationship extends to every child and every parent, regardless of the marital status of the parents (§ 7002), and sets forth various procedures by which the relationship of parent and child may be established. (§§ 7006, 7015.) In addition, it gives the natural father a right he did not previously possess: the right to notice of the hearing to terminate his parental rights. (§ 7017, subds. (b), (d), (f).)

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[1] All references are to the Civil Code unless otherwise indicated.

No adoption may be completed, even after a mother has relinquished the child, until a section 7017[2] petition is granted terminating the natural father's rights. Absent

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[2] Section 7017 provides in part:

"(a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who has (1) a presumed father under subdivision (a) of Section 7004 . . . the father shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, ... [¶] (b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father under subdivision (a) of Section 7004 . . . the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or unless the father has been served as prescribed in subdivision (f) with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to subdivision (c) of Section 7006 within 30 days of service of such notice or the birth of the child, whichever is later . . . . [¶] (d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f), . . . If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child."

his prior written waiver, he is entitled to notice of the hearing. If he appears and "claims custodial rights, the court *shall* proceed to determine . . . custodial rights . . . ." (§ 7017, subd. (d), emphasis added.)

The Legislature, however, when it enacted sections 7000 et seq., did not specify the standard to be employed in a section 7017, subdivision (d) proceeding. Our analysis of statutory and decisional authority, recent legislative history, and public policy leads us to conclude the section 4600 detriment standard applies to a section 7017 custody hearing.

Section 4600[3] was enacted in 1969 as part of the Family Law Act. It sets forth a mandate that custody of a child in a dissolution proceeding could not be awarded to nonparents without both parents' consent or a finding "that an award of custody to a parent would be detrimental to the child. . . ."

In *In re B. G.* (1974) 11 Cal.3d 679, this court analyzed the legislative history of section 4600 and concluded "[a]s enacted, section 4600 expressly recognizes that custody should be awarded to parents in preference to nonparents. As between parents, it permits the court to award custody

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[3] Civil Code section 4600, subdivisions (a) and (c) provide in pertinent part "In any proceeding where there is at issue the custody of a minor child, the court may, ... make such order for the custody of the child during minority as may seem necessary or proper." [¶] *Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. . . .*" (Emphasis added.)

'according to the best interests of the child,' but in a dispute between a parent and a nonparent, the section imposes the additional stipulation that an award to the nonparent requires a finding that 'an award of custody to a parent would be detrimental to the child.'" (*Id.*, at p. 698.) "There can be no question of the desirability of a uniform rule; the Legislature's specification that section 4600 applies to '*any proceeding where there is at issue the custody of a minor child*' demonstrates that section 4600 was enacted to fulfill that objective." (*Id.*, at p. 696, fns. omitted, emphasis added.)

The court in *In re Reyna* (1976) 55 Cal.App.3d 288, relying on *In re B. G.*, applied the section 4600 standard to facts similar to ours. An unwed father sought custody of his infant son after the mother relinquished the child for adoption. The court held "[b]ecause David asserts his entitlement to the physical custody of his child against the agency's claim to custody based on the mother's relinquishment, [section 4600] clearly applies." (*Id.*, at p. 296.)

The Second District Court of Appeal recently decided *In re Adoption of Baby Boy D.* (August 13, 1984) 2 Civ. B002775) — Cal.App.3d —. When a motion was made to terminate his parental rights, the unwed father sought custody. The court noted the issue was *custody*, not *adoption*. "So long as [the mother] does not assert her mother's right to physical custody, [the natural father] may not be denied custody of his child or have his parental rights terminated except upon finding that leaving custody with [the adoptive parents] is necessary to avert harm to the child." (*Id.*, at p. .)

The Legislature, when it enacted section 7017, was aware of this court's decision in *In re B. G.* extending the section 4600 standard to proceedings outside the Family Law Act. If the Legislature did not wish the detriment standard to apply to section 7017, subdivision (d) custody proceedings, it could have so indicated. (*In re William Phyle* (1947) 30 Cal.2d 838, *Estate of Carson* (1959) 174 Cal.App.2d 291, *Estate of Fritz* (1951) 102 Cal.App.2d 385.)

We are aware of the Legislature's enactment of Assembly Bill No. 649, vetoed by the Governor because he objected to certain financial provisions. Reintroduced as Assembly Bill 1782, and amended on January 17, 1984, the proposed statute again declared section 4600's parental preference would not apply to an alleged natural father seeking custody in a section 7017 hearing. However, this provision, as shown by a report on the bill to the Senate Committee on the Judiciary, was *never* considered by the Assembly Judiciary Committee, either as originally enacted or as reintroduced. The report stated: "AB 649 (McAlister) of 1983 contained a provision, identical to the one in AB 1782, applying the parental preference only to the presumed natural fathers. [¶] This provision was amended into both bills after they had left the Assembly Judiciary Committee. Thus it is once again being considered by only one policy committee. [¶] AB 649, which passed Senate Judiciary on a vote of 9-1, was heard when almost 80 other bills were on calendar." The report continues: "On November 18, the Select Committee on Children and Youth held an interim hearing on alleged and presumed fathers. This hearing was well attended by

representatives from the Department of Social Services, adoption agencies, the academic community, and those interested in fathers' rights. [¶] *The consensus of the witnesses was that the rights of alleged fathers are important and should be protected.* [¶] *This bill is contrary to that consensus.*" (Emphasis added.)

In a similar report on the bill, as amended February 23, 1984, the Senate Committee on the Judiciary confirmed the Legislature did not intend to deprive alleged natural fathers of the parental preference of Civil Code section 4600—"After lengthy debate the subject matter of this provision [denying alleged fathers section 4600 protection] was sent to interim, and the author agreed *to amend it out of the bill.*" (Emphasis added.) Thus the Legislature has declined its opportunity to disprove application of the section 4600 standard to section 7017 hearings.

Our interpretation is also consistent with the public policy which led to the Uniform Parentage Act and other relevant civil code sections. Sections 221-230 set forth the mechanisms for adoption. Section 232-240 contain the applicable law on freeing a minor from parental custody and control. Read together with the Uniform Parentage Act, the following statutory scheme emerges.

Under section 197, both mothers and presumed fathers[4] are *entitled* to custody of their minor children. An

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[4] Section 7004 provides in part: "(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions: [¶] (1) He and the child's natural mother are or have been married to each other and the child is born

(Continued on following page)

adoption can proceed *only* if their consent has been given or their parental rights have been terminated pursuant to a section 232 or section 224 hearing. The mother and presumed father are equally entitled to the child's custody; therefore his consent is necessary before the child may be adopted.

However, if the father is merely a natural father[5] and not a presumed father, the mother alone is entitled to the child's custody. *Only when the natural mother relinquishes the child for adoption* do the natural father's rights commence. (§ 7017, subd. (d).) He is to be notified and his custodial rights, if claimed, determined before the adoption can proceed.

(Continued from previous page)

during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. [¶] (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and, [¶] (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or [¶] (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and [¶] (i) With his consent, he is named as the child's father on the child's birth certificate, or [¶] (ii) He is obligated to support the child under a written voluntary promise or by court order. [¶] (4) He receives the child into his home and openly holds out the child as his natural child."

[5] A natural father is one who has been found to be the biological father but not a presumed father.

The Legislature intended to differentiate between the veto powers accorded unwed mothers and presumed fathers on the one hand and natural fathers on the other. Application of the detriment standard does not defeat this policy. We do not find *W.E.J. v. Superior Court* (1979) 100 Cal.App.3d 303 to the contrary. *W.E.J.* recognizes ". . . that, although the father was not a presumed father," he nevertheless was entitled to a hearing to determine his custodial rights. (*Id.*, at p. 311.) Confusion arose when the court seemed to reject a detriment standard by inferring its use would be tantamount to a veto. We agree the natural father, unlike the presumed father, holds no automatic veto power over the adoption. It does not follow, however, that the use of the detriment standard would lead to such a veto power and we disapprove any language in *W.E.J.* to the contrary.[6] In the context of section 7017, the mother must relinquish the child for adoption before the natural father has any rights. And once the child has been relinquished, we can foresee many instances where the trial court could find it was not only in the best interests of the child to terminate the father's parental rights, but it would be *detrimental* to the child

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[6] We note an additional problem with applying *W.E.J.* in the present context. The hearing below in *W.E.J.* was an *adoption* proceeding, not a section 7017 hearing. As a result, its author was concerned because there was "no finding that the *change of custody* [from the prospective adoptive parents] was in the child's best interest." (*Id.*, at pp. 306-307.) But the concerns voiced by the other justices illustrate there was no consensus on the appropriate standard to be applied. The dissent strongly supported application of the detriment standard enunciated in *In re B.G., supra*, 11 Cal.3d 679. The concurring opinion stated, "The trial court is directed (as it has not yet done) to consider, whether it *will be adverse to the best interests of the child* to give custody to the father." (*Id.*, at p. 315.)

not to do so. Then, as the natural and not the presumed father, his consent would be unnecessary and the adoption could proceed.

III

The major United States Supreme Court cases addressing cognizable interests of unwed fathers have involved situations where the fathers assumed full custodial responsibility or failed to pursue possibilities available to them. They either voluntarily ignored their rights or were precluded from ever exercising full custodial control because the mother had not relinquished the child. Both *Stanley v. Illinois* (1972) 405 U.S. 645[7] and *Caban v. Mohammed* (1979) 441 U.S. 380[8] involved biological fathers

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[7] In *Stanley*, the court concluded, "as a matter of due process," a father's parental rights could not be terminated without notice and "a hearing on his fitness as a parent . . . ." (*Id.*, at p. 649.) The *Stanley* court held unconstitutional a statutory scheme which irrebuttably presumed all unwed fathers unfit.

[8] The court in *Caban* found a statute allowing unwed mothers, but not unwed fathers, to prevent adoptions, to be unconstitutional. The court concluded "this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests." (*Id.*, at p. 394.) The court found no "profound difference between the affection and concern of mothers and fathers for their children." (*Id.*, at p. 392.) and indicated "no showing" was made that allowing natural fathers *the right to consent* would "pose a strong impediment for adoption." (*Id.*, at p. 392.)

The *Caban* court, however, in two footnotes, specifically limited the application of its holding. In footnote 11, the court acknowledged the question of newborns was not at issue and reserved judgment. In footnote 16, the court stated: "Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." (*Id.*, at p. 394.)

who had established strong ties with the children and held them out as their own. Both would qualify in California as presumed fathers, entitled to custody. Both had taken the affirmative steps necessary to assume parental responsibilities. By contrast, in *Quilloin v. Wolcott* (1978) 434 U.S. 245,[9] the father did not live with the child, offered only sporadic support, and made no attempt to legitimate the child until it was *11 years old*, when adoption was sought by the mother's husband. The court denied the legitimation petition by the natural father, who had declined to accept parental responsibility for 11 years and failed to avail himself of his statutory right to do so, on the ground of the best interests of the child. He had *not* requested custody. Under these circumstances, it is not difficult to assume the court could have also found it detrimental to the child to place her with the natural father. Additionally, in *Quilloin*, the mother *retained* custody and merely consented to her new husband's adoption request. Thus, no question arose of transferring custody from the only remaining parent.

Similarly, in *Lehr v. Robertson* (June 27, 1983) — U.S. —, 103 S.Ct. 2985,[10] the mother remarried and the

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[9] A "father's interest in the 'companionship, care, custody, and management' of his children is 'cognizable and substantial,' [citation] and . . . the State's interest in caring for the children is *'de minimis'* if the father is in fact a fit parent [citation]. *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father . . . in which the countervailing interests are more substantial." (*Quilloin v. Walcott, supra*, 434 U.S. 246, 248).

[10] In *Lehr*, the court found constitutional a statutory scheme requiring an unwed father to file a notice with a registry claiming paternity of a child born out of wedlock if he was to be entitled to notice of adoption proceedings. But again the court did not rule on the issue with which we are presented.

new husband sought to adopt. The biological father was not given notice of the adoption proceedings because he had not strictly complied with New York law by filing a claim with the putative father registry. Again, a statutory method of establishing a parent-child relationship was available but he took no action to utilize it.

The Supreme Court has not directly considered a fact situation similar to ours, where a mother has relinquished a newborn child and refused the father any contact. Thus the court has not addressed whether the natural father's parental rights may be terminated by only a best interests standard, or if a further finding of detriment is required.

We recognize our state scheme satisfies the procedural requirements of notice and opportunity to be heard. Thus, our holding is not based on any *lack* of federal due process. However, it is appropriate to note a recent law review article exploring the constitutional rights of unwed fathers. "Recognition of an opportunity interest in unwed fathers requires a conclusion that if the two elements of a constitutionally protected parent-child relationship are the biological link and commitment to and exercise of custodial responsibility, the state may not deny biological parents the opportunity to establish a protected custodial relationship." (Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson* (1984) 45 Ohio State Law Journal 313, 351.) This "opportunity interest" may, however, be lost where a parent voluntarily fails to pursue custodial responsibility or "the child's stepfather voluntarily assumes full custodial re-

sponsibility for the child." (*Id.*, at p. 368.)[11] The fitness or detriment standard is met in the first instance by effective abandonment; in the second, the father will never have an opportunity to seek custody.

However, in the absence of these factors, and where an adoption is sought by "strangers, the father's opportunity to establish a protected relationship must prevail in the absence of his unfitness." (*Id.*, at p. 373.)

IV

We have held section 4600 applies to all parental custody proceedings involving a minor child. (*In re B. G.*, *supra*, 11 Cal.3d 679.) Whether it now applies in section 7017 hearings should not be controlled by the context in which insemination occurs. The actions of *both* parents after the birth of their child determine their ability to accept parental responsibility. An unwed mother may have had no more desire to conceive or knowledge of the conception than the unwed father. Nevertheless she is given a choice to keep or relinquish the child because she gave birth. Her decision to release the child for adoption

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[11] In *Adoption of Rebecca B.* (1977) 68 Cal.App.3d 193, 198, the court held only the mother's consent necessary for a stepparent adoption but found " . . . there inhere in the natural father certain residual rights in the child which cannot be terminated by adoption [citation] without notice and the opportunity to be heard. *Until the child is adopted, the natural father of an illegitimate child is a parent within the meaning of section 4600* (*In re Reyna, supra*, 55 Cal.App.3d at p. 297)." (*Id.*, at p. 199.) "[S]ubsequent relinquishment of the child to an adoption agency by the mother (§ 224m), [constitutes a change] of circumstance which could lead to the acquisition of custody by the natural father." (*Id.*, at p. 200.)

should not deprive the father of a meaningful opportunity to retain and develop his relationship.

At natural father may not have *initial* custodial or veto rights equal to those of a presumed father. However, both classes of fathers share the same *burdens* of support for the child and liability for the reasonable expenses of the mother's pregnancy and confinement. (§§ 7010 and 7012.) Thus when the natural father's rights *do* arise, upon relinquishment by the mother, and he claims custody at a section 7017 hearing, an additional finding of detriment is necessary to terminate his parental rights.

V

We have held the trial court erred by applying the best interests of the child standard without first determining whether granting custody to the natural father would be detrimental. A review of the evidence introduced at the hearing indicates a finding of detriment would have been unsupportable *at that time*. However, concerned, as we must be, with the child's welfare and because of the passage of time, we recognize further evidence will be necessary.[12] The circumstances leading to the earlier determination should be reviewed in light of subsequent events. "[W]e recognize that during the pendency of this appeal, additional circumstances bearing on the best interests of the child[ren] herein may have developed. Any such circumstances may, of course, be considered by the

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[12] We recognize the dilemma arising under the present fact situation. The state has placed the child with prospective adoptive parents pending resolution of Edward's claims, strong relationships have developed and breaking those bonds could be harmful to the child.

trial court on remand." (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 741.)

We emphasize the section 7017 hearing is ancillary to the adoption, and while a condition precedent, it is not determinative. Adoptions can only be concluded after completion of the termination hearings and custody cannot, therefore, be determined by *comparing* the adoptive family and the father.

The judgment terminating the father's custodial rights is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

SONENSHINE, J.*

WE CONCUR:

BIRD, C.J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.

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* Assigned by the Chairperson of the Judicial Council.

COPY

IN RE BABY GIRL M.
L.A. 31876

DISSENTING OPINION BY MOSK, J.

I dissent.

At the outset I note serious omissions in the facts related in the majority opinion. The opinion fails to mention that on August 5, when Edward first met with the social worker, he informed her that he was not interested in obtaining custody of the child because he was the divorced father of two small boys, and the child was a female. He suggested that she be adopted by a family whose acquaintance he had made at his church. Nor did Edward express any desire for custody on his second visit with the social worker on August 10. It was not until later that he made his first request for custody. By this time, the child's mother had signed the consent for adoption, and the section 7017 petition had been filed. The evidence is in conflict as to whether the child had been placed in the adoptive home before or after Edward purportedly changed his mind and sought custody for himself.

As I point out, infra, the Legislature intended to differentiate between the rights of presumed fathers and natural fathers in a section 7017 proceeding. The holding of the majority makes no such distinction. The result of their opinion is to grant to a biological father, who may have had a single night's liaison with a stranger, who may not have known about the child's birth until long after it occurred, and who may not have ever seen the child, the very same custodial rights in a section 7017 proceeding as are afforded to a father who was married to the mother for many years and lived with and supported his children

emotionally and financially over a long period. There is no persuasive reason why the best interest of the child should not be a sufficient standard to test the custodial rights of a man who has had no relationship of any nature with a child other than biological.

The practical result of the holding of the majority is that in the future an unwed mother who elects to place her child for adoption in a stable environment with a two-parent family will refuse to relinquish custody whenever, as is commonly the case, she does not desire custody to be placed with the man who became a father as the result of a casual liason and who has not formed any relationship with the child. In the present case, this scenario is more than theoretical. The mother signed the relinquishment only on condition that custody be transferred to the two-parent family chosen as adoptive parents. The social welfare department implied that it would permit her to withdraw her consent if this condition is not fulfilled.

Turning, then, to the legal flaw in the majority opinion I am of the view that their conclusion that a natural father's right to custody may be terminated only if the court finds such an award would be detrimental to the child can only be reached by disregarding the critical provisions of section 7017. This is precisely what the majority cavalierly do. They do not attempt to explain or to rebut the impact of the crucial provisions of the section. The opinion simply makes no reference to the provision of subdivision (d) of section 7017[1] that if the man is a presumed father, his consent to adopt is required,

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[1] The only reference to these provisions is in the statute quoted in a footnote.

whereas if he is not a presumed father "only the mother's consent shall be required for the adoption of the child."

The holding of the majority is inconsistent with the clear desire of the Legislature to differentiate between the rights of presumed and natural fathers in a section 7017 proceeding. They conclude that both presumed and natural fathers must be granted custody unless the court finds that such an award would be detrimental to the child. Why, then, did the Legislature direct the trial court must make a determination in that proceeding whether a man is a presumed or a natural father, and then provide that the question whether his consent to adoption is necessary shall be decided solely on the basis of the answer to this question?

The issues of whether a father must consent to an adoption and whether the detriment standard is employed in a section 7017 proceeding are inseparable. The legislative direction that the natural father's consent is not required is another way of declaring that the court need not make a finding of detriment in order to free the child for adoption. Otherwise, there would be no difference between the custodial rights of presumed and biological fathers in a section 7017 proceeding. That is, a presumed father's consent to adoption is required under subdivision (d) and, as everyone concedes, he may not be deprived of custody absent his consent unless the court finds that such an award would be detrimental to the child. But inexplicably the majority apply this standard to the biological father's rights.

In effect, the majority have given the biological father the right to veto an adoption, in contravention of the Legislature's express direction to the contrary. It is in-

escapable that the application of the detriment standard to a natural father gives him the identical veto powers over an adoption and the same custodial rights as are granted to a presumed father under section 7017.

The majority concede that the Legislature "intended to differentiate between the veto powers accorded unwed mothers and presumed fathers on the one hand and natural fathers on the other" (maj. opn., *ante*, at p. —*), but their attempt to explain why this intent is not being violated here is patently untenable.

First, they state that "the natural father, unlike the presumed father, holds no automatic veto power over the adoption" because if the trial court finds that it would be detrimental to the child to allow custody to the natural father, then "as the natural and not the presumed father, his consent would be unnecessary and the adoption could proceed." (Maj. opn., *ante*, at p. —.**) But if a finding of detriment were made, the presumed father would also be denied custody, and for that matter the mother of any other person who sought custody would also be rejected. The majority strike out on that point.

Second, the majority declare that there is a distinction between the custodial rights of presumed and natural fathers in that *before* the mother relinquishes the child for adoption she and the presumed father have equal custodial rights (Civ. Code, § 197), whereas the natural father's right to custody, if any, does not arise until after the relinquishment. However, we are concerned here only

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* Typed opinion at page 10.

** Typed opinion at page 11.

with a section 7017 proceeding, which by definition does not occur until after relinquishment by the mother. It is in such a proceeding the Legislature has directed that a presumed father must consent to adoption, whereas a natural father's consent is not required. The majority's reliance on distinctions between the rights of natural and presumed fathers in other contexts is, therefore, unavailing.

The legislative history of section 7017 strongly indicates that it was not the Legislature's intent to grant the identical custodial rights to biological and presumed fathers. An earlier version of the measure contained a provision that a natural father must be found unfit before a court could dispense with the requirement that he consent to an adoption. (Sen. Bill No. 347, as amended May 20, 1975, § 7023, subd. (d)). Later, the statute was amended to provide, as it does presently, that only the mother's consent is necessary for an adoption in the case of a father who is not classified as a presumed father. (Sen. Bill No. 347, as amended Aug. 12, 1975, § 7017, subd. (d).) While the circumstances under which the amendment was adopted are not clear, the elimination from the statute of the provision that a natural father must consent to an adoption unless he is found unfit demonstrates at the very least that at some point in the legislative process the right of a natural father to custody was considered and rejected.

Another indication of legislative intent appears from an analysis by the Assembly Judiciary Committee of Senate Bill No. 347, which contains the Uniform Parentage Act. This analysis, published in connection with the third reading of the measure, makes it clear beyond any doubt that the act does not grant any custodial rights to a natural

father or require his consent for adoption. The analysis states, inter alia, that the measure abrogates "any right to custody whatsoever" in the natural father.[2]

Finally, in September 1983, the Legislature passed a statute which expressly declared that the provisions of section 4600 "relating to parental preference shall not apply to an alleged natural father seeking custody in an action brought pursuant to . . . subdivision (d) of section 7017." (Assem. Bill No. 649 (1983 Reg. Sess.) § 6, subd. (h).) Although the Governor vetoed the measure because it contained certain financial provisions to which he objected, in his message to the Assembly the Governor

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[2]A comment printed with the proposed act states: "In 1972, in *Stanley v. Illinois*, 92 S.Ct. 1208, the Supreme Court gave natural fathers an undelineated, ill-defined right to the custody of their children. According to the Assembly Judiciary Committee analysis, 'No one can say with certainty the extent to which that right adheres, the circumstances under which the court can deprive a natural father of that right. In substance, at this point the court has asserted the existence of some right to custody in a natural father, but left the nature and extent of that right to conjecture. *This bill seeks to settle the issue by abrogating any right to custody whatsoever unless the father has adopted the child (and becomes a presumed father) by receiving the child into his home and holding the child out as his natural child. Unless the father is a presumed father, the mother alone can consent to the child's adoption. Furthermore, while an alleged father must be given notice of an adoption proceeding, and is given the right to come into court and seek custody, there are absolutely no standards under which, if met, the court would be required to grant him custody.* In fact, it is questionable whether the court has the authority to grant custody to the natural father. Any such authority must be implied from the fact that the father has the right to seek it. The bill does not contain a provision granting the court express authority to give custody to a non-presumed father. It is questionable whether in this respect the bill meets the constitutional standard of Stanley.'" (1975 Assem. File Analysis, microfiche ed., emphasis added.)

stated that he supported the substantive changes in the statute. (Governor's Press Release No. 504, Sept. 29, 1983.)

The majority's arguments based on legislative history following the veto of Assembly Bill No. 649 are less than convincing. It is incorrect to say, as do the majority, that because the author of a later bill decided to remove from the measure a provision that natural fathers would be granted section 4600 rights the "Senate Committee on the Judiciary *confirmed* the Legislature did not intend to deprive alleaged natural fathers of the parental preference of Civil Code section 4600." (Maj. opn., *ante*, at p. —,* emphasis added.) The *Legislature* (as opposed to a single member of a legislative committee) made its intention clear beyond any doubt when it enacted Assembly Bill No. 649 in 1983 providing that the section 4600 standard did not apply to section 7017 proceedings.

Nor am I persuaded by the majority's reliance on the fact that In re B.G. (1974) 11 Cal.3d 679, had been decided before the Uniform Parentage Act was adopted. From this, the majority draw the inference that the Legislature's failure to provide that the section 4600 standard did not apply raises an implication it intended to extend the parental preference doctrine to natural fathers.

Preliminarily, I note, that the majority also appear to rely on In re Reyna (1976) 55 Cal.App.3d 288 for the same point, but *Reyna* was decided after the Uniform Parentage Act was passed, and therefore it cannot support their contention. (See fn. 5, at p. 304.)

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* Typed opinion at page 8.

The facts and background of *In re B.G. are so* different from the present case that the implication the majority draw from its holding is untenable. That case involved the rights of a mother whose children had been removed from her custody without her consent—a situation dramatically different from that involved here. The decision was filed and section 4600 became law, before the advent of the Uniform Parentage Act, and at a time when a natural father had virtually no right in his children. Such a father lacked not only the benefit of the parental preference doctrine (Deering's Civ. Code (1971 ed.) §§ 200, 224; Guardianship of Truschke (1965) 237 Cal.App.2d 75, 80; Adoption of Irby (1964) 226 Cal.App.2d 238, 241; Adoption of Laws (1962) 201 Cal.App.2d 494, 500; Darwin v. Granger (1959) 174 Cal.App.2d 63, 70), but there was no statutory provision which entitled him to notice of a pending adoption proceeding, and he had no right to be heard in such a proceeding. If the Legislature had intended by the enactment of section 7017 to grant to natural fathers rights equal to those of a presumed father, a far more explicit reference would be required to justify such a radical departure from existing law.

More important, section 7017, subdivision (d), is inconsistent with section 4600, subdivision (c). While the former provides that the consent of the natural father to an adoption is not required, the latter states that a father's consent to the adoption is necessary unless the court makes a finding of detriment. As we point out above, if a biological father would be entitled to custody, absent a finding of detriment, his consent to the adoption would also be required. Thus, the Legislature, by providing in section 7017 that *only* the mother's consent is required if the child

has no presumed father, determined that the parental preference rule stated in subdivision (c) of section 4600 does not apply to natural fathers. Simply stated, application of the parental preference rule here would directly violate the Legislature's mandate that the natural father's consent to an adoption is not required.

This conclusion is further supported by the fact that at the same time the Legislature enacted section 7017 (Stats. 1975, ch. 1244, § 11), it amended the provisions of the Civil Code relating to adoptions to provide that the consent of the mother *and the presumed father* is required for an adoption (Stats. 1975, ch. 1244, § 7). The majority would by their *ipse dixit* amend this provision to include the natural father.

The majority strain mightily to support their untenable result by an erroneous evaluation of United States Supreme Court decisions relating to natural fathers. It is impossible to read the court's opinion in Lehr v. Robertson (1983) — U.S. —, and not recognize that due process requires nothing more than notification to the natural father that his rights may be terminated.

In *Lehr*, the natural father lived with the mother for two years, until the child's birth. He visited the mother and child in the hospital every day, but from the time of her discharge and for two years thereafter, the mother concealed the child's whereabouts from the father. During this period, the father never ceased his efforts to locate the child; he even hired a detective agency to find her. When he did find her, he visited the child as often as the mother would permit. He offered financial aid, and set up a trust fund for his daughter. The mother threatened the

father with arrest if he persisted in his attempt to see the child. The father retained counsel, who promised legal action if the mother refused to allow visitation rights.

The mother remarried, and her new husband filed a petition to adopt the child. The natural father also filed an action in another county to establish visitation and parental rights. Even though the court in the adoption proceeding was aware of the paternity action, it granted the adoption petition. The United States Supreme Court upheld the decision on the ground that the natural father had failed to comply with a New York procedure to register his name with a "putative father registry."

The high court's opinion is replete with references to the effect that a biological father need not be granted the same rights as a presumed father. It observed that the "mere existence of a biological link does not merit equivalent constitutional protection" as is afforded to a father who participates in the rearing of his child (— U.S. at p. —; [ ] and that since the lower court was not terminating a *developed* relationship the natural father's rights were adequately protected by the notification provided by the "putative father registry."[3] For obvious reasons the majority make no reference to these matters; they attempt to distinguish the decision on the

[3]The court characterized Stanley v. Illinois (1974) 405 U.S. 645, as holding that the "automatic destruction of the custodial relationship" rendered the statute there unconstitutional (103 S.Ct. at p. 2992), quoted from the opinion of the dissenting justices in Caban v. Mohammad (1979) 441 U.S. 380, which relied on the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility", and distinguished these two cases from *Lehr* on the ground that they involved a "developed parent-child relationship" (*id.* at p. 2993).

ground that it did not involve a newborn child who was refused contact with the natural father is transparently fallacious.[4] The implication of the majority that a natural father cannot be deprived of custody unless he voluntarily declines the opportunity to establish a relationship with his child cannot be harmonized with the decision in *Lehr*.

Case authority is consistent with my conclusion. W.E.J. v. Superior Court (1979) 100 Cal.App.3d 303, recognizes that under the theory employed here by the majority the natural father would have a veto power over an adoption, contrary to the Legislature's intention. To the same effect is Adoption of Marie R. (1978) 79 Cal.App.3d 624.

A number of cases involving the rights of natural fathers were decided on the basis of the law predating the Uniform Parentage Act. Since the provision of section 7017 that a natural father's consent to an adoption is not required was not yet in effect, they have no relevance in the interpretation of section 7017. (In re Reyna, supra, 55 Cal.App.3d 288; Adoption of Rebecca B. (1977) 68 Cal.App.3d 193 [holding only that the natural father was entitled to notice and hearing of a pending adoption, and may be entitled to custodial rights if an adoption proceeding is abandoned].) In re Lisa R. (1975) 13 Cal.3d 636, involved an attempt by the natural father of a child with no living mother or presumed father to establish

[4]The majority also attempt to distinguish *Lehr* on the ground that the father there had not attempted to file notice with the putative father registry. Such registration would only have provided notice similar to that set forth in section 7017 and would not have granted any custodial rights to the natural father.

paternity; neither its holding nor its language is relevant to the present case.

Finally, even if the detriment standard is improperly applied in evaluating Edward's custodial rights, I would direct the trial court on remand to give substantial weight, in deciding whether it would be detrimental to award custody to Edward, to the circumstance that the child has been with the adoptive parents virtually all her life. Although the majority recognize the "dilemma" posed by the adoptive parents' custody (maj. opn., *ante,* at p. —, fn. 12*), they fail to give this emotional circumstance its appropriate effect.

A number of cases have recognized the trauma in removing a child from a settled home. In adoption proceedings this factor has been given determinative effect. (Adoption of Michelle T. (1975) 44 Cal.App.3d 699, 710; In re Volkland (1977) 74 Cal.App.3d 674; Williams v. Neumann (Ky. App. 1966) 405 S.W.2d 556, 679-680; In re Adoption of Tachick (Wis. 1973) 210 N.W.2d 865, 872-873.) *Michelle T.* quotes from the *Williams* case: " '[the petitioners have] attended every baby and childhood need and demand of [the child] from the fourth day of her life when she could neither focus her eyes nor raise her head. Up to this hour, according to this record, [she] has known no other mother as she has never seen her natural mother. She is now three and one-half years old and talking. She cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration

* Typed opinion at page 18, fn. 12.

and bewilderment.' " (44 Cal.App.3d at p. 707, italics omitted.)

In In re Reyna, supra, 55 Cal.App.3d 288, the court applied the detriment standard to the custodial rights of a natural father under procedures predating the Uniform Parentage Act. It recognized that on remand "if it is shown that it would be emotionally and psychologically harmful to uproot the child from the care and love of the nonparents with whom it has been living for a substantial period of time and place it with the father with whom it has never had contact, then custody must remain with the nonparents." (55 Cal.App.3d at p. 302.)

The majority, by not directing the trial court to give substantial weight to this factor, fail to take sufficient cognizance of the trauma of separation of this child from the secure home of the only parents she has ever known, to be placed in the custody of a man she does not know and who originally rejected her. This callous result follows because the majority err by applying an inappropriate legal standard. In so doing they will cause untold disruption of the normal adoption process and serious damage to the valid social and humanitarian purposes orderly adoption procedures heretofore provided.

I would affirm the judgment.

MOSK, J.

I CONCUR:

KAUS, J.

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Attorneys for Petitioner

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

In And For The County Of San Diego

No. A 24905

In the Matter of the Petition to Terminate the Rights of the Alleged Natural Father, EDWARD McNAMARA, to BABY GIRL MILLER, a Minor	) JUDGMENT AND) ORDER) TERMINATING) RIGHTS OF A) FATHER)) (Filed) February 26, 1982)

The petition of the San Diego County Department of Social Services, a licensed adoption agency, for an order terminating the rights of Edward McNamara, alleged natural father, to the minor, Baby Girl Miller, pursuant to Civil Code Section 7017(b), came on regularly for trial on December 18, 1981, before the Honorable Judith McConnell, Judge presiding; the petitioner appearing by its counsel, Donald L. Clark, County Counsel, by Janet B. Houts, Deputy County Counsel; respondent Edward McNamara appearing personally and through counsel, Joseph D'Addario, Esq.; and James E. Bunker, Esq. appearing as amicus curiae; the court having read the official report

filed by the San Diego County Department of Social Services in this matter, the cause having been submitted to the court for decision, and the court having reviewed points and authorities submitted by both parties, and the court, being fully apprised in the premises, having filed a written Memorandum Decision granting said petition, WHEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the rights of the alleged natural father, Edward McNamara, to the subject minor, BABY GIRL MILLER, are terminated.

DATED: FEB 26 1982

JUDITH McCONNELL
Judge of the Superior Court

In The

SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

IN RE BABY GIRL M., a Minor.	)	
	)	
COUNTY OF SAN DIEGO, DEPARTMENT OF SOCIAL SERVICES,	)	L.A. No. 31786
	)	Appeal
Petitioner and Respondent,	)	County San Diego
vs.	)	Superior Court No. A 24905
EDWARD M.,	)	
Appellant.	)	

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the* judgment terminating the father's custodial rights is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

Appellant shall recover costs on appeal.

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 22nd day of October, 1984.*

WITNESS *my hand and the seal of the Court, this 26th day of November, 1984.*

(SEAL)

LAURENCE P. GILL
Clerk
By /s/ D. McHENRY
Deputy

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SAN DIEGO COUNTY DEPT. OF SOCIAL SERVICES, RESPONDENT,	)	No. D003076
vs.	)	SUPERIOR COURT NO. A24905
EDWARD MC NAMARA, APPELLANT,	)	(Filed May 18, 1987)
(IN RE BABY GIRL M., A MINOR	)	

THE COURT:

Because counsel for the parties have not sought rehearing, the petition for leave to file as an amicus is DENIED. The petition shall be lodged in the file for transmittal to the Supreme Court if review is granted.

By /s/ Wiener
Acting *Presiding Justice*

Copies to: James E. Sutherland, Esq.
Arlene Prater, County Counsel
Joseph D'Addario, Esq.
Lee Selvig, Esq.
County of San Diego Super Court

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, No. D003076
S001172

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

(Filed July 30, 1987)

In re BABY GIRL, M., a Minor

COUNTY OF SAN DIEGO, etc.,
Petitioner and Respondent,

v.

EDWARD M., Respondent and Appellant.

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed April 30, 1987, which appears at 191 Cal.App.3d 786;mod. at 192 Cal.App.3d 90c). (Cal. Const., Art. VI, Section 14; Rule 976, Cal Rules of Court.)

By PANELLI
Acting Chief Justice

STATUTORY PROVISIONS

California Civil Code, section 4600, subdivision (b) (3) (c):

"Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a non-parent is required to serve the best interests of the child."

California Civil Code, section 7004, subdivision (a):

"A man is presumed to be the natural father of a child if he meets the conditions set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after

its termination by death, annulment, declaration of invalidity, or divorce;

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child."

California Civil Code, section 7006, subdivision (c):

"An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative of the mother if the mother has died or is a minor, a man alleged or alleging to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. Such action shall be consolidated with proceeding pursuant to subdivision (b) of Section 7017. The parental rights of the alleged

natural father shall be determined as set forth in subdivision (d) of Section 7017."

Former California Civil Code, section 7017, subdivision (d) (2):

"If . . . the natural father is identified to the satisfaction of the court . . . (he) shall be given notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship with 30 days of serving such notice or the birth of the child, whichever is later. . . . If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child."

FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO,
DEPARTMENT OF ADOPTIONS,

Appellee.

On Appeal From the Court of Appeal of the State of California, Fourth Appellate District, Division One

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO,
DEPARTMENT OF ADOPTIONS,

Appellee.

On Appeal From the Court of Appeal
of the State of California,
Fourth Appellate District, Division One

MOTION OF APPELLEE TO DISMISS OR AFFIRM

To The Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellee, COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES (erroneously designated as "County of San Diego Department of Adoptions" by appellant) moves the court to dismiss the appeal herein or,

in the alternative, to affirm the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One on the grounds that it is manifest that the appeal does not present a substantial federal question, that any federal question sought to be reviewed was not timely and properly raised and that the judgment rests on an adequate non-federal basis.

OPINIONS BELOW

This appeal purports to be from the April 30, 1987 opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One (Appellant's Appendix[1] pp. 1a-41a). By order dated July 30, 1987, the California Supreme Court denied appellant's Petition for Review and ordered the opinion not to be published in the Official Appellate Reports. (App. p. 81a.)

In actuality, however, the appeal herein really is as to the October 1984 opinion of the California Supreme Court, *In re Baby Girl M.*, 37 Cal.3d 65 (1984) (App. pp. 42a-76a). This opinion held that the provisions of California Civil Code section 4600 as to the dual standard of best interests and detriment was applicable to California Civil Code section 7017 proceedings to terminate the rights of an alleged natural father. The court of appeal opinion from which this appeal purports to be taken rejected appellant's contention

[1]The references to the opinions below, statutes and other documents which appear in the Appendix to appellant's Jurisdictional Statement are hereinafter cited as "App. —".

that the legal standard of detriment had not been properly applied on the remanded trial.

STATUTORY PROVISION INVOLVED

California Civil Code section 7017 provides the provisions for terminating the parental rights of an alleged natural father (an unwed father who has never received the child into his home) when a mother relinquishes a child for adoption.[2] When the California Legislature enacted these provisions they did not specify the standards to be employed in a California Civil Code Section 7017, subdivision (d) proceeding (App. p. 84a). The California Supreme Court in ***In re Baby Girl M., supra,*** determined that under the then state statutory scheme California Civil Code section 4600 was applicable. California Civil Code section 4600 provides that before a court makes any order awarding custody to a non-parent, it shall make a finding that an award of custody to the parent would be detrimental and award of custody to a non-parent is required to serve the best interests of the child. Effective January 1, 1987, the California Legislature amended California Civil Code section 7017, subdivision (d)(2) as to the standards to be used in the proceedings and to specifically state that California Civil Code section 4600 does not apply to the

[2]As detailed in the Argument section III herein, a different statutory scheme (Cal. Civ. Code, § 232, *et seq.)* provides for the termination of the parental rights of mothers and presumed natural fathers (as defined by Cal. Civ. Code, § 7004; App. pp. 82a-83a) in California.

proceedings (App. pp. 15a-15a-2). The legislative amendments were not applied to the case herein.

STATEMENT OF THE CASE

On August 10, 1981, appellee County of San Diego Department of Social Services, a licensed adoption agency, filed an action pursuant to California Civil Code section 7017, subdivision (b) seeking to terminate the rights of appellant to Baby Girl M. (Miller) born July 18, 1981 so that the minor could be adopted. The minor had been relinguished for adoption by the mother on August 5, 1981. The mother and appellant had had a casual three month relationship from approximately September through November 1980; they had not married nor attempted to marry and appellant was unaware of the mother's pregnancy or the minor's birth until about August 1, 1981. Appellant initially stated he did not want custody of the minor himself but wanted the minor placed for adoption with a family of his own choosing, which alternative was rejected by the mother and never followed through by the family he had chosen. Appellant then indicated an interest in custody himself. At the time he was unmarried, had temporary custody of his two sons by a prior marriage and was proposing a full-time child care situation for the minor while he worked. On August 24, 1981 the minor was placed with a family whose profile the mother had approved and she has been with that family ever since. Other than a few short visits in 1981 there have been no visits or contacts between appellant and the child (since named Katie).

The first trial in this matter was in December 1981 and the court granted the petition finding that appellant was the alleged, but not the presumed, natural father of the minor and that it would not be in the best interests of the minor for appellant to be given custody. Appellant filed an appeal from that judgment contending that the trial court should have applied the California Civil Code section 4600 dual standard of best interests and detriment in the proceeding. In 1983, the Court of Appeal of the State of California, Fourth Appellate District, Division One reversed the superior court decision finding that the California Civil Code section 4600 dual standard of best interests and detriment applied to these proceedings. Appellee then petitioned for hearing in the California Supreme Court, which was granted and on October 22, 1984, the California Supreme Court issued its split decision (*In re Baby Girl M., supra,* 37 Cal.3d 65) in which the majority concluded that California Civil Code section 4600 is applicable to California Civil Code section 7017 proceedings and remanded the matter to the trial court for further proceedings consistent with the opinion—specifically for the trial court to consider the issue of detriment. The California Supreme Court in its decision specifically indicated that a finding of detriment could be sustained without a finding of parental unfitness. (*In re Baby Girl M., supra,* 37 Cal.3d 65, 75-76.) Although this apparently is the issue now raised by appellant on appeal before this Court, appellant did not seek review of this decision by this Court.

Pursuant to the remand by the California Supreme Court, a trial was held in February 1985, at the conclusion of which the court made both the detriment and best interests findings. The trial court specifically found that Katie

would suffer extreme emotional and psychological harm should she be removed from her adoptive home and that this harm constitutes detriment under California Civil Code section 4600. Appellant filed an appeal from that judgment and approximately two years later on April 30, 1987, the California Court of Appeal issued a split decision affirming the trial court. (App. pp. 1a-43a.) The majority decision concluded that the California Supreme Court had already determined that a finding of detriment can be sustained without a showing of parental unfitness and under the controlling legal standard it is proper to make a finding that the minor would suffer extreme detriment if removed from the home she had been in since 1981 (a period of almost six years by the time of this decision). Appellant filed a Petition for Review in the California Supreme Court which was denied on July 30, 1987, and the California Supreme Court ordered the case not to be published in the Official Appellate Reports. This appeal was filed on October 28, 1987. Appellant has filed this appeal with a motion for leave to proceed in forma pauperis although appellant lists his gross annual income as $36,000 in his affidavit filed in this Court on November 10, 1987.

The California Legislature has since amended California Civil Code section 7017, subdivision (d)(2), effective January 1, 1987 to specify that Civil Code section 4600 (the dual standards of best interests and detriment) is not applicable to such proceedings. These amendments were not held to apply to the case herein which was decided under the former California law, which law is no longer in effect (App. pp. 15a-15a-2).

Since the case is final in the California courts, the minor has now been adopted by the family with whom she

has been since August 1981. This case has been in the courts, and Katie in her adoptive home, for more than six years.

SUMMARY OF ARGUMENT

Appellee submits the appeal herein should be dismissed in that the questions and arguments presented in appellant's jurisdictional statement substantially misstate the holdings of the California courts in this matter. Further, the federal question apparently now sought to be reviewed by appellant was not timely or properly raised below or expressly passed on. Finally, any federal question raised in the appeal is so manifestly unsubstantial, based both on the holdings in the California cases below and the subsequent change of the law in California, that the appeal should be dismissed.

ARGUMENT

I. THE QUESTIONS PRESENTED AND SUPPORTING ARGUMENT OF APPELLANT IN HIS JURISDICTIONAL STATEMENT SUBSTANTIALLY MISSTATE THE HOLDINGS OF THE CALIFORNIA COURTS BELOW

Appellant states the question in his jurisdictional statement at page i whether it is a denial of equal protection to terminate the parental rights of an unwed father "... solely because it is in the best interests of the child?" and

argues in support of his appeal that the California Supreme Court had previously ruled in the case and the court of appeal declined to reconsider " . . . that California's custody tests of 'best interests' of the child controlled paternity suit claims by father's [sic] seeking to retain their parental rights." (p. 1.) Appellant then states that the test is that a parent is entitled to custody unless custody with the parent would be detrimental to the child but he continues to argue that the California courts applied solely the "best interests test" in this case. These argument substantially misstate the holdings of the California courts in this case and are seriously misleading as to those opinions and as to what federal issues can now properly be raised on this appeal.

In fact, the very question before the California Supreme Court in 1984 was the question of whether the parental rights of an alleged natural father might be terminated solely on a best interests finding or whether a court must also make a finding as to detriment pursuant to California Civil Code section 4600. In the 1981 trial, the court had applied only a best interests test. The California Supreme Court in *In re Baby Girl M., supra,* 37 Cal.3d 65 ruled that this was incorrect and that the proper standard in a California Civil Code section 7017, subdivision (d) proceeding to terminate a natural father's parental rights required not only a best interests finding but *also* a finding that it would be detrimental to the child to award the father custody. Thus, the California Supreme Court rejected a

test based solely on best interests and remanded the case for further proceedings as to the finding of detriment.[3] Therefore, it is grossly incorrect and misleading for appellant to now state that the California test that was applied to him was a "best interests test".

Although the arguments raised in appellant's jurisdictional statement are confusing it would appear that the only possible issue that could be raised by appellant in this appeal is as to the legal standard of detriment established by the California Supreme Court in this case in 1984 and pursuant to which the California Court of Appeal rendered its decision from which this appeal follows. Therefore, the rest of appellee's arguments herein will address whether an appeal should be granted on this issue of the legal standard of detriment applied to appellant rather than the questions raised of whether appellant's rights were terminated solely under a best interests test since clearly they were not and therefore that issue does not present any question, federal or not, for this Court to review.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED IS NOT TIMELY OR PROPERLY RAISED AT THIS TIME

Since as set forth in section I above the question of termination of an alleged natural father's rights solely on the basis of "best interests" is not a proper question, then the remaining question raised by appellant is whether it is

---

[3]As set forth above, the California Legislature has since amended California Civil Code section 7017, subdivision (d) as to the standards to be applied but these amendments were not applicable to appellant, and therefore cannot be considered by this Court on this appeal.

a denial of equal protection to terminate the parental rights of an unwed father without a finding adverse to his parenting ability (Appellant's Question II). This question was neither timely raised and presented below nor is it timely raised and presented now. In effect, what appellant is really seeking to do is to have this Court review the 1984 decision of the California Supreme Court but such review would not be proper.

In *In re Baby Girl M., supra,* 37 Cal.3d 65, the California Supreme Court determined that it was necessary to make a detriment finding in the case and specifically remanded the case for application of the detriment standard based on later developing facts (37 Cal.3d at pp. 75-76). The majority opinion of the California Court of Appeal decision from which this appeal follows concluded that the California Supreme Court decision in this case (as well as its later decision in *Michael U. v. Jamie B.,* 39 Cal.3d 787 (1985)) had already resolved the standard for a finding of "detriment" which did not require a finding of parental unfitness (App. pp. 7a-15a). Therefore, the California Court of Appeal ruled that under the standard established by the California Supreme Court, detriment was established in this case by the severe psychological harm Katie would suffer if removed from the only parents she had known for six years (App. pp. 7a-15a).

Thus, what appellant is really seeking to do on this appeal is to challenge the decision of the California Supreme Court in 1984. This is not proper for several reasons. First of all, appellant has failed to show that he raised this particular issue before the California Supreme Court on the initial appeal. Although the California Court of Appeal, in the opinion from which this appeal is

taken, addressed constitutional issues, it correctly rejected consideration of the issue of whether a finding of detriment can be sustained without a finding of parental unfitness based on the prior Supreme Court decision in this case and *Michael U.* (App. p. 8a). Appellant contends at page 6 that the issue of terminating parental rights based solely on the best interests of the child has been raised and reserved by this Court. However, as set forth in paragragh I herein, that is not the issue before this Court in this case as that is not what the California courts found to be the standard to be applied to appellant.

Appellant states at pages 1-2 that "no appeal was filed previously because the judgment terminating parental rights was not final; it was subject to the unwed father, appellant, proving he was the best person to have custody so he could retain his rights." Not only does this statement misstate the holding of the courts below, but appellant is incorrect that he could not have filed this appeal from the 1984 California Supreme Court decision. Although 28 United States Code section 1257 requires an appeal to be filed from a "federal judgment or decree rendered by the highest court of a state", appellee submits that an appeal could have been filed from the 1984 California Supreme Court decision in this matter as it was final on the issues now raised. (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973).)

Moreover, it is extremely prejudicial and inequitable to seek review now, three years later, in a case concerning a minor who has been with her adoptive family for a period in excess of six years now. Because of appellant's failure to timely and properly file this appeal from the California

Supreme Court decision, this case which has now been in the judicial system more than six years is still pending to the prejudice of all involved.

III. EVEN IF THE FEDERAL QUESTION HAS BEEN TIMELY AND PROPERLY PRESENTED BY APPELLANT, NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CAUSE

As set forth above, the only issue of law properly raised by appellant is whether it is a denial of equal protection to terminate the parental rights of an unwed father without a finding of parental unfitness and this issue as raised in this case presents no substantial federal question for consideration by this Court. Appellant asserts that parenting is a fundamental right and that this case raises substantial issues. However, these conclusionary statements are made without any argument or analysis other than citing several cases of this court as to parental rights of fathers.

In California the law provides for two categories of fathers: so-called "presumed natural fathers" and "alleged natural fathers" and provides for different rights for each category. Appellant is classified as an "alleged natural father". A presumed natural father is defined by Civil Code section 7004, subdivision (a) (App. p. 82a). Basically, he is one who was married to (or attempted to marry) the mother at the time of the birth or conception or has received the child into his home and openly held out the child as his natural child. Presumed natural fathers have rights basically equal to that of mothers as to custody, consent to adoption and as to involuntary termination of parental rights. (Civ. Code § 232 et seq.) A bio-

logical father who does not qualify as a presumed natural father does not have these same rights but has more limited rights.

Under the California statutes, an alleged natural father must be given notice, consistent with due process requirements, of a proceeding to terminate his parental rights, before a minor may be adopted. The court then proceeds to determine parentage and custodial rights. (Civ. Code § 7017, sub. (d); App. p. 84a.) The California courts have upheld these statutory distinctions between presumed and alleged natural fathers. Further, in *In re Baby Girl M., supra,* 37 Cal.3d 65, the California Supreme Court concluded that under the then applicable state statutory scheme a court must also find that it would be detrimental to the child to award custody to the alleged natural father. Detriment was defined as not to require a finding of parental unfitness and that standard was applied to appellant in terminating his rights on remand.

Generally, state law governs parent-child relationships, although in some cases this Court has held that the federal Constitution supersedes state law and provides even greater protection for certain formal family relationships and in a few cases this Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out of wedlock. (*Lehr v. Robertson,* 463 U.S. 248, 257-259 (1983).) In addition to *Lehr,* this Court has considered the extent to which a natural father's biological relationship with his child received protection under the due process clause in *Stanley v. Illinois,* 405 U.S. 645 (1972), *Quilloin v. Walcott,* 434 U.S. 246 (1978) and *Caban v. Mohammed,* 441 U.S. 380 (1979).

Stanley v. State of Illinois, supra, 405 U.S. 654 concerned a biological father who, although not married to the mother, had lived with her and the children intermittently for eighteen years and held the children out as his own and this Court held that, after the mother died, the state could not take the children without notice and a hearing on his fitness. In California, this father would be classified as a presumed natural father with the rights thereof. *Caban v. Mohammad, supra,* 441 U.S. 380 again concerned a biological father who, although not married to the mother, lived with her for five years as husband and wife, during which time two children were born. As an unwed father, New York State law did not provide him with a veto to an adoption and this Court found this state law unconstitutional. Again, California would classify Caban as a presumed natural father.

In *Quilloin v. Walcott, supra,* 434 U.S. 246, this Court considered a biological father who had never married the mother or lived with the twelve-year old minor whom a stepfather was seeking to adopt. The Georgia state statute denied him any veto power over the adoption. The Court upheld the statute as to a claim of equal protection. The Court found the "best interests of the child" standard was adequate as to this category of father and family without the necessity of a showing of his "unfitness." Also, in *Parham v. Hughes,* 441 U.S. 347 (1979) this Court upheld a Georgia statute as to an equal protection challenge which precluded the father of an illegitimate child from suing for the wrongful death of his child.

Therefore, it can be concluded that while constitutional guarantees may provide certain rights to biological

fathers (such as notice and hearing), the individual situations must be carefully scrutinized to determine exactly what rights are to be accorded, and there is no denial of equal protection to have terminated appellant's rights without a finding of unfitness but based on the detriment established by the severe harm the child would suffer if removed from her adoptive home.

The issues and facts in this case present no substantial question for this Court to again consider the rights of unwed, biological fathers. In *In re Baby Girl M., supra,* 37 Cal.3d 65, 74, the court noted that this Court had not directly considered a fact situation similar to the case herein where a mother has relinquished a newborn child and refused the father any contact and that this Court had not addressed whether the natural father's parental rights might be terminated by only a best interests standard or if a further finding of detriment was required.

However, in *Lehr v. Robertson, supra,* 463 U.S. 248, this Court found constitutional a registry statutory scheme, under which an unwed father was required to file a notice in a registry in order to be entitled to notice of an adoption proceeding. Under that scheme, appellant herein would probably have had no opportunity to be heard or if heard, apparently only a best interests standard would have applied. This Court found that the "mere existence of a biological link" does not mean constitutional protection equivalent to a mother or a father of a developed parent-child relationship, but merely the opportunity to develop a relationship. The biological father in *Lehr* had made substantial efforts to establish a relationship with the child but was prevented by the mother, yet this Court

upheld the statutory scheme which terminated his rights. Appellee submits that under this Court's analysis in *Lehr*, and the preceeding cases as to unwed fathers, appellant herein has not been denied any constitutional right or opportunity and has not been denied any equal protection such that a substantial federal question is presented. Neither the statutory scheme nor the standard of detriment used in the California courts in this case have violated any constitutional rights of appellant.

If however, it is conceded for purposes of argument that a man has a constitutional right to a child with whom he has no relationship, which arises solely from a casual, unintentional insemination of a woman with whom he basically has no further relationship, appellee submits that the nature of any such constitutional right is minimal and must be balanced against the interests (constitutional and otherwise) of the others involved in this matter, and most importantly, of the child. The paramount interest, as expressed in the California laws and decisions, as well as the opinions of this Court, is the welfare of the child. (*Lehr v. Robertson, supra,* 463 U.S. 248, 258.) Any constitutional rights granted to unwed fathers by this Court's prior decisions do not give such a father the right to be awarded custody if the child will be harmed. Balanced against what is basically a property claim of the biological father in these circumstances are the constitutional rights of the child. This Court has recognized that a child is not beyond the protection of the Constitution (*Bellotti v. Baird,* 443 U.S. 662 (1979)) and the harm and detriment to the child's rights, who has been in her adoptive home for more than six years, must tilt the balance in favor of denying appellant custody. Thus, appellant's reliance on the prior

cases of this Court is misplaced in showing either a deprivation of equal protection or that the facts and issues of this case present an important question of federal law.

Finally, it is important in determining whether this case presents a substantial federal issue to look at both the uniqueness of the facts and issues in this case and the statutory changes in the California law which are now applicable although they were not applied retroactively to appellant but which effectively render moot the issue as to the legal standard of detriment to terminate the rights of alleged natural fathers. Although this case, and the six years it has already been in litigation, have clearly had a profound impact on the lives of the parties to this particular case, because of statutory and case law changes and the unique facts of this lengthy litigation, this case raises no substantial federal issue. Although appellant's jurisdictional statement attempts to raise emotional issues, appellant has failed to show that the courts' definition of detriment as not equalling unfitness, and as applied in this case, is of any substantial federal importance such that this Court should find that it has jurisdiction and continue these already too long protracted legal proceedings.

IV. CONCLUSION

For the foregoing reasons, appellee's motion to dismiss the appeal herein or in the alternative to affirm the judgment of the State of California Court of Appeal, Fourth Appellate District, Division One should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 87-5840

In The

Supreme Court of the United States

October Term, 1988

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

August 10, 1981 – Petition to Terminate the Rights of a Father (CC 7017(b)) and Order for Investigation and Report, in the Superior Court of the State of California

October 2, 1981 – Answer & Declaration to Petition, by Edward McNamara, in the Superior Court

December 18, 1981 – Trial in the Superior Court

February 9, 1982 – Memorandum Decision, in the Superior Court

February 26, 1982 – Judgment and Order Terminating Rights of a Father, in the Superior Court

April 29, 1982 – Statement of Decision, in the Superior Court

October 22, 1984 – Judgment of the Supreme Court of the State of California, reversing and remanding for further proceedings (with dissent)

February 25-27, 1985 – Further hearing in the Superior Court

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October 27, 1987 – Notice of Appeal to the Supreme Court of the United States, in the Court of Appeal of the State of California

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

In the Matter of the Petition to Terminate the Rights of the Alleged Natural Father, EDWARD McNAMARA, to ___ ___ MILLER, a Minor	No. 24905 PETITION TO TERMINATE THE RIGHTS OF A FATHER (CC7017(b)) AND ORDER FOR INVESTIGATION AND REPORT [Filed August 10, 1981]

Petitioner is the San Diego County Department of Social Services a licensed adoption agency. The San Diego County Department of Social Services, through its authorized representative, is informed and believes and upon such ground alleges:

1. That the minor, ___ ___ MILLER, resides in the County of San Diego; that said minor was born in San Diego, California on July 18, 1981.

2. That said minor is in Petitioner's custody by virtue of the mother's relinquishment.

3. That said minor has no presumed natural father as defined by Civil Code Section 7004.

4. That EDWARD McNAMARA is the alleged natural father of said minor.

5. That it is in the best interests of said minor to terminate the rights of the alleged natural father so that she may become available for adoption.

WHEREFORE, your Petitioner prays that this honorable court inquire into these matters, that the rights of said alleged natural father be terminated and that

the court order that only the consent of the mother of said child is required for adoption.

Dated: August 10, 1981.

DONALD L. CLARK, County Counsel
By /s/ Arlene Prater
ARLENE PRATER, Deputy
Attorneys for Petitioner

VERIFICATION

* * * *

ORDER

The Petition to Terminate the Rights of a Father having been filed and considered by the Court, and GOOD CAUSE APPEARING THEREFOR,

The San Diego County Department of Social Services, Adoptions Division, is hereby ordered to perform the investigation as to the identity of the natural father required by subsection (c) of Civil Code Section 7017, as to the natural father of ___ ___ MILLER, a minor, and report thereon to the Court in writing within 30 days, by filing the original with the County Clerk, Attention Adoptions Division, on that date and sending a copy to Arlene Prater, Deputy County Counsel, at County Mail Station A12.

Dated: AUG 10, 1981.

/s/ G. Dennis Adams
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

(Title Omitted in Printing)

CASE NO. A 24905

ANSWER & DECLARATION
TO PETITION

[Filed October 2, 1981]

I, EDWARD McNAMARA declare and say:

1. I am the natural father of the minor child in question.

2. I do not wish that my parental rights as Father be terminated by this court.

3. I wish to have legal custody and physical custody of my child.

4. I am in the process of having LEGAL AID represent me in this matter as I cannot afford an attorney. As yet, I have not had my first appointment with them.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of October, 1981.

/s/ Edward McNamara
EDWARD McNAMARA

[Trial in the Superior Court was held December 18, 1981. The reporter's transcript is part of the certified record in 4th Civil No. 26793 of the California Court of Appeal.]

SUPERIOR COURT FOR THE
STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

(Title Omitted in Printing)

No. A 24905

MEMORANDUM DECISION

[Filed February 9, 1982]

This matter came on regularly for trial on December 18, 1981, and, after the presentation of evidence and argument, supplemental points and authorities were requested. Upon their receipt the matter was taken under submission.

This Court has previously ruled that respondent is the alleged but not the presumed father of the child. He was never married to the mother, never cohabited with her, and never took the child into his home as his own. Under these circumstances the law accords him very few rights vis-a-vis the child, i.e., a right to notice and to be heard.

The Court finds that only the consent of the mother is required for the adoption of the child. While there is evidence that Mr. McNamara is a capable parent to his boys, the child who is the subject of this action has been with her adoptive parents since birth, is thriving, and has become a part of a family unit.

The burden of proof in this action is on the father to prove parentage and that his custody would be in the best interest of the child; the father has proved his biological parentage, but has failed to persuade the Court by a preponderance of the evidence that it would

be in the best interest of the child for the father to have custody.

Therefore, the petition will be granted as prayed for.

DATED: February 8, 1982.

/s/ Judith McConnell
JUDGE OF THE SUPERIOR COURT

[The superior court Judgment and Order Terminating Rights of a Father was filed February 26, 1982, Jurisdictional Statement Appendix, p. 64a.]

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

(Title Omitted in Printing)

No. A 24905

STATEMENT OF DECISION
(C.C.P. Section 632)

[Filed April 29, 1982]

Pursuant to Respondent's request for Finding of Fact and Conclusions of Law in the above-matter and the Order of the Court signed on March 3, 1981, petitioner submits the following Statement of Decision, over objection, pursuant to Code of Civil Procedure Section 632 and Rule 232 of the California Rules of Court, as amended.

The above-entitled case came on regularly for trial on December 18, 1981, before the Honorable Judith McConnell, judge presiding, in Department One of the above-entitled court. Petitioner, San Diego County Department of Social Services appeared by its attorney Donald L. Clark, County Counsel, by Janet B. Houts, Deputy County Counsel. Respondent Robert McNamara appeared personally and through counsel, Joseph D'Addario, Esq., and James E. Bunker, Esq., appeared as amicus curiae.

Evidence, both oral and documentary, was introduced on behalf of all parties and the matter taken under submission for decision.

On or about February 8, 1982, Judge McConnell isused (sic) a Memorandum Decision which was filed on February 9, 1982, and which stated the proposed decision to grant said petition. Judgment and order terminating rights of respondent father, Robert

McNamara, was signed and filed on February 26, 1982. Thereafter on March 3, 1982, the within request was filed.

During trial it was determined, and the court found in its Memorandum Decision, the respondent, Robert McNamara, was the alleged, not the presumed natural father of Baby Girl Miller. He was never married to the mother, never cohabited with her, and never took the child into his home as his own. As an alleged father of the child, he possesses few rights, but may have a right to be heard. His consent is not required for the adoption of the child; only the mother's consent is necessary. He has the burden of proving biological parentage, which the court found he fulfilled. He also has the burden of proving that custody with him would be in the best interests of the child, which the court found he failed to satisfy. Although he is a capable parent to his two sons, the minor child in this action has been with the adoptive parents since birth and has become a part of that family. Said child was placed with an adoptive family because the mother relinquished her and respondent initially expressed no desire to have custody of her.

It is in the best interests of the child to have her remain with the family who has cared for her almost all of her life and to be adopted by them. Accordingly, the Petition to Terminate the Rights of the Alleged Natural Father, Robert McNamara to Baby Girl Miller, is granted.

DATED: 4-29-82

/s/ Judith McConnell
Judge of the Superior Court

In the Supreme Court of the State of California

No. L.A. 31786
Filed October 22, 1984
In re Baby Girl M.
San Diego County Department of Social Services,
Plaintiff and Respondent,
v.
Edward M.,
Defendant and Appellant.

reported at 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 918

[The opinion of the court is at Jurisdictional Statement Appendix, p. 36a.]

[The opinion of Mosk, J., dissenting, is at Jurisdictional Statement Appendix, p. 51a.]

[The Remittitur, filed November 26, 1984, is at Jurisdictional Statement Appendix, p. 66a.]

Superior Court of California,
County of San Diego

[Further hearing was held February 25, 26, and 27, 1985. The reporter's transcript is part of the certified record on appeal in 4th Civil No. D003076 of the California Court of Appeal.]

Superior Court of California,
County of San Diego

Appellee's excerpts from report of Gerald E. Nelson, M.D., dated February 22, 1985, received in evidence on further hearing as Petitioner's (Appellee's) Exhibit 1:

SUMMARY OF THE EXAMINATION:

Katie is a 3 ½ year old girl who has lived with her family since infancy and who has grown and developed into a normal, healthy, well-adjusted child. She has a close, trusting attachment to her mother and father as well as to her 6 year old brother. She has a good sense of who she is and relates to her family and to others in a trusting, conflict-free manner. She percieves (sic) of her foster-parents as her psychological parents. Her parents, Robert and Pamela Moses, are normal, well-adjusted adults who care deeply for Katie and percieve (sic) of her as though she were their natural child.

Through all of the past 3 ½ years of stress and anxiety, Katie has been protected from the uncertainties which surround her custody. She shows no evidence of having been traumatized or stressed by the long controversy. She is a bright, sensitive child who has learned how to behave well, relate well, and learn. She appears to have a good, strong conscience. Her parents have been conscientious in their child-rearing and have formed a strong, trusting attachment between herself and them.

DETRIMENT:

It is highly likely that Katie will suffer extreme psychological and emotional harm if she were removed from the care and custody of her psychological parents, Robert and Pamela Moses. The child psychiatric literature is replete with books and articles describing the devastation children suffer if they lose their parents, whether by death, divorce, or other reasons. Such losses should be avoided if at all possible.

The work done by John Bowlby, M.D. on attachments, separation, and loss between parent and child pertains specifically in this case. He describes the three phases of a child of 15 to 30 months will undergo if it should lose its mother. The first phase is termed "protest" and during it "the young child appears acutely distressed at having lost his mother and seeks to recapture her by the full exercise of his limited resources. He will often cry loudly, shake his cot, throw himself about, and look eagerly towards any sight or sound which might prove to be is missing mother. All his behavior suggests strong expectations that she will return. Meanwhile, he is apt to reject all alternative figures who offer to do things for him; though some children will cling desperately to a nurse." He is withdrawn, makes no demands on people in theenvironment (sic) and appears to be in a state of deep mourning. This is a quiet stage, and sometimes, clearly erroneously, is presumed to indicate a diminution of distress.

The phase of despair is a painful one and also may last several weeks or months. The feelings of hopelessness, despair, sadness, and anger are easily engaged if

a child is seen at this phase of mourning. Regression to previous levels of adaptation and coping become evident. The child appears sad and withdrawn, looses (sic) her appetite, oftentimes has disturbed sleep patterns, and will become clinging and the physical movements diminish or come to an end, and he may cry monotounously (sic) or intermittently."

Despair is not the end of the childs (sic) intense feelings, but a change. The child remains preoccupied with his or her need to be reunited with her parents and is vigilent (sic) for her mother's return. Every time a door opens or a woman walks by, the child quickly scans and is alert to see if this is her mother returning. The feelings of an observer are one of empathic pain and anguish, feeling the child's yearning to be reunited with her mother.

The next phase is called detatchment (sic). The child seems to lose her interest in her mother and to become emotionally detached from her. it (sic) is apparant that the child's psychological defenses are operating so as to remove the internal pain which the loss of the parent, particularly the mother, has caused. This process too can last for several months.

The mourning process that a small child goes through when she has lost her parent can last for several months usually, and may last indefinitely. How a child responds to the loss depends on the child's underlying tempermant. Despite differences in temperment (sic), all children grieve and suffer prolonged anguish if they lose their parents.

What is the sequellae of a child undergoing such a loss? In general children regress to previous developmental levels while they are undergoing this profound psychological and emotional trauma. Katie will regress in the area of speech, affective function (how she deals with strong feelings. She will tend to use more infantile ways of expressing anger, sadness, jealousy or any other feelings.) Her speech will regress to where she will likely use less complex forms of speech and she may begin to stutter or stammer or become dysfluent in her articulation. She is likely in her vegatative (sic) function to regress. Her sleep will become disturbed. She will likely have nightmares or night terrors. She will be wakeful at night, having difficulty going to sleep and staying asleep. she (sic) will tend call out for her mother at night, confused and forgetting that her mother is no longer there, and she will cry for long periods of time at night for her mother. Her appetite will diminish and she will become finicky and picky about which food she will eat. She will regress in her motor function. She will be less likely to walk alone, she will want to be carried or held frequently. She will lose interest in manipulating objects and will tend to stimulate herself in infantile ways. She might start rocking, head banging, fingering her hair, sucking her thumb, and there will be clear evidence of psychomotor retardation. It is unlikely that there will be a change in her sexual function or development.

Katie's general development will have stopped, and her psychological growth will regress as she attempts to deal with devastating loss of her parents. While she is regressing, she is not growing and developing. Katie

will loose (sic) 6 months to a year of emotional and psychological development, some of which she may not recover.

Long term effects have been long noted in the psychiatric literature. James Anthony found "The findings thus far in this study strongly support the hypothesis that parental loss in childhood is an important factor in the development of suicidal tendencies and there is some evidence that these tendencies are related to disturbances in current object relations.

It is of particular interest that there seems to be *no essential difference* in terms of the development of significant suicidal ideation between subjects substaining (sic) parental loss because of death of a parent from those suffering loss because of parental separation." Dr. Noshpitz says "Any premature removal of the child from his mother, from his father, or from the child's familiar enviornment (sic) will plunge him into a developmental crisis".

He goes on to state "Prolonged absense (sic) of the parent from the home or parental death incline the child toward chronic affective and cognitive disorganization and discontent." The Cass and Thomas 1979 study stated that "the loss of a parent before age 6 and a broken home were more frequent occurrences in the most disturbed group. Impulsiveness, poor relationships with adults, accident proneness, and resistiveness were also more prevalent in the most disturbed group."

Bowlby has stated in Vol. 3, *Attachment and Loss*, "Loss of a loved person is the most intensely painful of

experiences any human being can suffer. And not only is it painful to experience, it is also painful to witness, if only because we are so impotent to help. To the bereaved, nothing except the return of the lost person can bring true comfort; should what we provide fall short of that it is felt almost as an insult.

Again and again, emphasis will be placed on *the long duration of grief*, on the difficulties of recovering from its effects, and on the adverse consequences for personality functioning that loss so often brings. Only by taking serious account of the facts as they seem actually to be, is it likely that we will be able to mitigate pain and disability and to reduce the casualty rate."

"At one time it was confidently believed that a young child soon will forget her mother, and so gets over her misery. Grief in child, it was thought, was short lived. Now however, more searching observation has shown that this is not so. Yearning for mother's return lingers on".

"The ways in which children and adolescents respond to the loss of a parent differ from the ways in which adults mourn the loss of a parent or a spouse. In so far as there are differences they turn mainly on the finding that children and adolescents are even more sensitive to the conditions that precede, surround, and follow a loss than are adults."

"Looking after a grieving child is exacting and unrewarding work; and it is small wonder that caregivers become impatient and irritable. After a small child has lost a parent, therefore, it is by no means

unusual for him to be subjected to strong pressure to "forget" his grief and, instead, to become interested in whatever his current caregiver thinks may distract him".

As stated by Erna Furman, "Some studies of adult patients judge that parental berievement in childhood is a significant factor in etiology of various forms of mental illness and adult maladjustment. Several writers focus on a category of disturbances in which childhood bereavement leads to an interference in development and results in arrest, regression, or distortion of the personaiity."

All studies of children who have lost their parents at age 3½ suggest profound psychological and emotional regression following such a loss and frequent long-term serious effects of their subsequent mental health. There is no doubt that Katie will suffer profound psychological and emotional trauma if she loses her psychological parents. She is now a bright, happy, well-adjusted child. She trusts her parents to provide a safe, protective, nuturing (sic) environment for her. To remove her from the care and custody of these parents would cause immediate psychological and emotional sequellae. Long term effects are more difficult to predict, but it is likely that she will become depressed and sensitized to future loss. This means that if she suffers loss, as she surely will in the future, she will relive similar psychological and emotional symptoms as she will suffer if she loses these parents. Namely, she will feel like a 3 ½ year old child who has lost her parents. This will recur every time she loses someone of significance. This might include a boyfriend, a spouse, a child,

or a parent, or a friend. This will render her vulnerable to clinical depression, an anxiety state, or she might use her psychological defenses to "numb out" the emotional pain, thus rendering her less sensitive to her human enviornment.

CONCLUSION:

Katie has lived with her current caretakers for 3½ years. She percieves them as her psychological parents. To remove her from the care and custody of these caretakers would cause devastating immediate sequellae which would last several months and would profoundly effect her development. It would also make her vulnerable to mental illness later in life. It is therefore my professional opinion that to remove Katie from her present home and place her in the care and custody of her natural father would be a detriment.

Respectfully submitted,

/s/ Gerald E. Nelson, M.D.
Gerald E. Nelson, M.D.

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

(Title Omitted in Printing)

No. A24905

REPORTER'S PARTIAL TRANSCRIPT

WEDNESDAY, FEBRUARY 27, 1985

[This portion of the transcript appears at pages 31-34 of volume II of the reporter's appeal transcript, February 27, 1985, in the certified record on appeal in 4th Civil No. D003076 of the California Court of Appeal.]

(p.1) SAN DIEGO, CALIFORNIA, WEDNESDAY, FEBRUARY 27, 1985, 10:49:

The Court: I note for the record that all counsel are once again present, as well as the parties.

I considered taking the matter under submission and writing out a decision, but I don't think anyone wants to wait any further. And so I apologize for the brief delay, but I think it's more appropriate that I rule from the bench in this case.

I would like to add that I have taken the time since yesterday to read the record from the prior file. I've also read and reread my notes of the testimony that has been received in this proceeding, as well as the cases submitted and argued by counsel.

Naturally I've read numerous times the decision of the Supreme Court to make sure that I have a feel for what my task is in this case.

And I think it's not my job at this point to assess fault with anyone for the history that's led us to this

date, the problems that have come about, and so I won't do that. I'm not going to lay blame for any of these problems on anyone's doorstep.

My job, as I understand it, is to determine whether an award of custody of this child to her parent, the father, Mr. MacNamara (sic), would be detrimental to her.

And the evidence that I have before me consists of, first of all, the testimony and report of Dr. Nelson, who is and (sic) experienced, board-certified child psychiatrist, (p.2) familiar with problems that children encounter when they suffer separation.

And his opinion was that removal of Katey (sic) from the only home that she's ever known would cause extreme psychological and emotional harm to her.

He found her to be a bright, happy, well-adjusted child, who would suffer profoundly if she were removed from the Moses home.

Furthermore, it is likely in his opinion that she would become depressed and sensitized to future loss, and vulnerable to mental illness later in life.

Dr. Nelson further stated that even with a slow removal from the Moses home, the child would suffer less harm ostensibly, but the trauma would still be great, and she would still suffer detriment as great as with a sudden removal. It would just be prolonged over a longer period of time.

The other evidence I have on the subject of detriment is the evidence of Dr. Lamson. Frankly, her testimony carries less weight, both because of her lesser

qualifications vis-a-vis Dr. Nelson, but also because of her lack of familiarity with the participants.

But I would also like to note a couple of things from her testimony. She testified that there would certainly be trauma to Katey (sic) – and I think those are her exact words – to be removed from the Moses home; and there could be permanent detriment.

She also said the trauma would be great here because (p.3) the child would lose the two parents that she has known virtually since birth, and they would be replaced by a man was is a stranger to her.

In other words, she did not disagree with the testimony given by Dr. Nelson.

I find the evidence is clear and convincing and, in fact, uncontradicted that Katey (sic) would suffer extreme emotional and psychological harm should she be removed from the Moses home. And this harm constitutes detriment within the meaning of civil code 4600.

I find that it would be in the best interest of the child that custody be awarded to Mr. and Mrs. Moses, who are in almost every sense the true parents of this child.

They have indicated that they will include Mr. MacNamera (sic) in Katey's (sic) extended family, and I encourage them to do so.

The petition under 7017 is granted.

Mr. D'Addario: Your honor, on behalf of Mr. MacNamera (sic), we would request a statement of decision on this matter.

The Court: All right. I will request the court reporter to transcribe the statements that I have just made, and that will constitute a statement of decision.

Mr. D'Addario: That's fine, your honor.

(Matter concluded at 10:15 A.M.)

(Certificate Omitted in Printing)

In The Superior Court of the State of California
In and for the County of San Diego

In re Baby Girl M., a Minor.	)	No. A 24905
COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES, Petitioner,	)	JUDGMENT TERMINATING THE RIGHTS OF AN ALLEGED NATURAL FATHER, RESPONDENT EDWARD McNAMARA.
v.	)	
EDWARD M., Respondent.	)	[Filed March 7, 1985]

The petition of the San Diego County Department of Social Services, a licensed adoption agency, for an order terminating the rights of respondent Edward McNamara, alleged natural father, to the minor, Baby Girl Miller, pursuant to Civil Code Section 7017(b) came on for further proceedings pursuant to the remand of the California Supreme Court in *In re Baby Girl M.* [1984] 37 Cal.3d 65 on February 25, 26, and 27, 1985 before the Honorable Judith McConnell, Judge Presiding. Petitioner appeared by its counsel Lloyd M. Harmon Jr., County Counsel, by Arlene Prater, Deputy County Counsel; respondent Edward McNamara appeared personally and through counsel Joseph D'Addario, Esq.; and Lee W. Selvig, Esq., appeared as amicus curiae on behalf of the adoptive family. The court having heard and considered the evidence of the parties and the matter having been submitted to the Court for decision and the Court being fully apprise (sic) in the premises and the Court having rendered its oral Statement of Decision and the Court having found by clear and convincing evidence that:

1. An award of custody to respondent Edward McNamara would be detrimental to the subject minor, Baby Girl Miller, and

2. An award of custody of Baby Girl Miller to petitioner non-parent is required to serve the best interests of said minor;

WHEREFORE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the rights of the alleged natural father, respondent Edward McNamara, to the subject minor, Baby Girl Miller, are terminated.

DATED: 3-7-85

/s/ Judith McConnell
Judge of the Superior Court

APPROVED AS TO FORM:

/s/ Joseph D'Addario
JOSEPH D'ADDARIO, ESQ.
ATTORNEY FOR RESPONDENT

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
* * *

March 25, 1987

Joseph D'Addario, Esq.
* * *

Ms. Arlene Prater
* * *

Lee W. Selvig, Esq.
* * *

Re County of San Diego Department of Social Services v. Edward M. - D003076

Dear Sir/Madam:

The parties are hereby notified the above-entitled case has been set for oral argument April 13, 1987 at 1:30 p.m. to permit them to address the following concerns of one or more members of the court. Each party may submit relevant points and authorities in letter form, at or before the time of oral argument.

Bearing in mind a section 7017 hearing is directed at terminating Edward's parental rights entirely, and only indirectly affects custody of his child, it can be argued the Department's action may have unconstitutionally prevented Edward from developing his protected opportunity interest to establish a parenting relationship which would allow him to withhold consent to adoption.

Analyzing United States Supreme Court decisions, one commentator concludes a fit and willing natural father has a constitutionally protected right to parent his child when he makes a timely effort, subject only to

the possibly paramount custodial right of the mother. (Buchanan, The Constitutional Rights of Unwed Fathers Before and After *Lehr v. Robinson* 45 Ohio State L.J. 313, 381-382.) When, as here, the State interferes with the natural father's parenting interests, the constitutional considerations come into play. Unlike most cases where parental rights are terminated with no showing of parental unfitness, here the State itself has physically barred Edward from developing a presumed parent status *and* has placed the child with a pre-adoptive couple whose interest is to maintain permanent custody and to develop a strong parent-child relationship. This was done two weeks after Edward expressed his desire to obtain custody and the mother abandoned her interest in the child by relinquishing her to the State. (See *W.E.J. v. Superior Court* (1979) 100 Cal.App.3d 303, 312.) Thus, the undisputed facts appears to be Edward promptly attempted to develop a parenting relationship, including custody before his daughter was placed in a pre-adoption home; the Department ignored Edward's desires without investigating his ability or fitness to assume custody and removed the child from a temporary placement to one intended to be permanent; Edward has always been willing and capable of providing loving and adequate parenting for his daughter; the juvenile court's decisions have been based on the significance of the "bonding" between the child and the pre-adoptive couple.

It appears this case is unlike most, if not all, those discussed in reported decisions in that it is the State which has both deprived Edward of his opportunity to retain his parental interests by becoming a presumed

father *and* elected to immediately place the child with a pre-adoptive couple to create the "bonding" which the court relied on. First, when the child was only five months old, to find it was in the child's best interest to sever her ties to her father, and later to support a finding of detriment should the child be removed from the placement couple.

Thus, this case is unlike *Michael U. v. Jamie B.* 39 Cal.3d 787, where the department *returned* the child to the mother once the natural father expressed a desire for custody and third parties litigated the section 7017 action and the natural mother is the person whose conduct prevented the father from developing his parental interest. Further, it appears different from the case of *In Re Tricia M.* 74 Cal.App.3d 125, where *this same agency* apparently maintained the relinquished child in foster or temporary placement until the section 7017 proceedings were held, thus not bringing into play the "bonding" aspect.

In addition to addressing these concerns, the parties should address the dispositions presently available to this court should it find the Department has violated Edward's constitutional right to develop his protected parental interest. In this context counsel should address the precedential effect of the California Supreme Court decision of Baby Girl M.

Very truly yours,

/s/ Felix Quenga for
KEENAN G. CASADY
Clerk

In the Court of Appeal of the State of California
Fourth Appellate District
Division One

[Slip Opinion of the Court, filed April 30, 1987, Jurisdictional Statement Appendix, p. 1a.]

[Concurring opinion, Work, J., Jurisdictional Statement Appendix, p. 15a.]

[Dissenting opinion, Lewis, J., Jurisdictional Statement Appendix, p. 24a.]

[Order modifying opinion, filed May 21, 1987, Jurisdictional Statement Appendix, p. 35a.]

[Order denying leave to file petition for rehearing amicus, filed May 18, 1987, Jurisdictional Statement Appendix, p. 68a.]

In the Supreme Court of the State of California

[The Petition for Hearing, filed June 8, 1987, is part of the certified record in 4th Civil No. D003076 of the California Court of Appeal.]

[Order Denying Review After Judgment By The Court of Appeal, filed July 30, 1987, Jurisdictional Statement Appendix, p. 69a.]

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5840

In The

Supreme Court of the United States

October Term, 1988

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

I

Is it a denial of equal protection to terminate the parental rights of an unwed father who promptly manifested a significant parental interest in his child and would be a good parent solely because it is in the best interests of the child?

II

Is it a denial of equal protection to terminate the parental rights of an unwed father without a finding adverse to his parenting ability when (A) other fathers must be found to have no interest in or ability for parenting before they lose their rights, and (B) unwed mothers do not lose their rights under similar conditions?

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9 Witkin, *Cal. Procedure*, Appeal, § 275 (3d ed. 1985) 36

OPINIONS AND JUDGMENTS BELOW

The Judgment and Order Terminating Rights of a Father, filed February 26, 1982, J.S. 64a[1] was accompanied by a Memorandum Decision, filed February 9, 1982, J.A. 7, and a Statement of Decision, filed April 29, 1982, J.A. 10. The opinion of the Supreme Court of the State of California, reversing and remanding for further proceedings, with a dissent, was filed October 22, 1984. J.A. 12, J.S. 36a. It is reported at 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 918.

After further hearings, the superior court's statement of decision was stated on the record February 27, 1985, J.A. 22, and the Judgment Terminating the Rights of an Alleged Natural Father, Respondent Edward McNamara, was filed March 7, 1985. J.A. 26. On appeal, three opinions were filed April 30, 1987: The opinion of the court affirming, J.S. 1a; an opinion concurring, J.S. 15a; and a dissent, J.S. 24a. The opinions are reported in the

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[1] *Matters of Form.*

"C.T." refers to the Clerk's Transcript on appeal below.

"J.A." refers to the Joint Appendix.

"J.S." refers to the Jurisdictional Statement.

"R." refers to the certified record with references to the case number in the Court of Appeal. The first one was 26793, heard in the California Supreme Court as No. L.A. 31786, and the second was D003076.

"R.T." refers to the reporters' transcripts in the appeals, with reference to the case number.

"S.A." refers to the Statutory Appendix following the Brief for Appellant, starting at page 1b.

California Official Advance Sheets at 191 Cal.App.3d 786, and 236 Cal.Rptr. 660, but were ordered not to be published in the Official Reports, Cal. Rules of Court, rule 976. J.S. 69a.

JURISDICTION

The Judgment and Appeal

The judgment of the Supreme Court of the State of California, denying Appellant's timely petition for review, was filed July 30, 1987. J.S. 69a. A notice of appeal was filed October 22, 1987 in the Court of Appeal of the State of California, Fourth Appellate District, Division One. This appeal was docketed October 28, 1987, within 90 days of the judgment below. Jurisdiction was postponed April 18, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2), or may apply 28 U.S.C. § 2103.

Jurisdictional Facts

At the first trial, the California trial court placed the burden of proof on appellant to prove that giving custody to him would be in the best interests of the child. J.A. 7-8. Appellant contended that he was entitled to the parental preference given to other parents, § 4600,[2] J.S.

[2] *Section citations.* All citations are to the California Civil Code unless otherwise noted.

70a: that he should get custody (thus becoming a presumed parent whose consent would be needed to adopt, § 7017(d)(2), J.S. 72a) unless it would be in the best interest of the child to give custody to a nonparent and detrimental to the child to give custody to him. R.26793, C.T. 18-20; 4th Civil No. 26793, Aplt. Open. Brf. 12-16.

He argued that he was entitled to that treatment under opinions of this Court construing and applying the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 4th Civil No. 26793, Aplt. Open. Brf. 12-14. Appellant did not specifically cite the provisions of that Amendment.

The California Supreme Court agreed. Construing the statute to include the parental preference, the court considered the relevant opinions of this Court and found the statute valid. J.S. 45a-48a.

The court specifically found that due process had been afforded. J.S. 47a. Going beyond, the court noted that this Court had not considered a similar factual situation involving a newborn surrendered for adoption, J.S. 45a, n. 8, nor the application of a best interest test requiring a finding of detriment from parental custody as a basis for terminating parental rights. J.S. 45a, n. 8, 47a. Further, the statute was found to protect adequately the opportunity of a father to develop a relationship with his child. J.S. 47a-48a. Consequently, there were no federal grounds to invalidate the statute as construed, nor to find a denial of equal protection.

Finding, however, that the record at trial did not support a finding of detriment *at that time*, J.S. 49a, emphasis original, the case was remanded for further

hearing as to subsequent events. J.S. 49a-50a. On remand, the trial court found that the child had been in the prospective adoptive parents' home so long that it would be detrimental to remove her and give custody to appellant. J.A. 23-24.

On appeal, appellant again urged the application of this Court's cases to his basic civil rights. 4th Civil No. D003076, Aplt. Open. Brf. 6. By letter to counsel, the Court of Appeal invited supplemental briefing by the parties on whether, under this Court's applications of the Fourteenth Amendment, J.A. 28-29, the County's "action may have unconstitutionally prevented Edward from developing his protected opportunity interest to establish a parenting relationship which would allow him to withhold consent to adoption." J.A. 28.

The County responded that the California Supreme Court had been "squarely presented" with the constitutional need for a finding of unfitness, 4th Civil No. D003076, Letter from County Counsel dated April 13, 1987, pp. 3-4, and "did *not* find a violation of appellant's constitutional rights." *Id.*, at p. 2, emphasis original. The Court of Appeal agreed and refused to reconsider the constitutional issues:

> "(E)xtensive citation to the Buchanan article. . .and federal precedent makes clear [the California Supreme Court] was aware of and considered the federal constitutional issues***preclud[ing] consideration of Edward's constitutional argument." J.S. 7a, n. 2.

Jurisdictional Argument

1. Appeal jurisdiction lies because the state court passed upon the statute and found it valid under the Fourteenth Amendment

The statute was found valid under the due process and equal protection standards established by this Court. J.S. 45a-48a. That invokes the Court's jurisdiction. *Clark v. Jeter*, No. 87-5565 (June 6, 1988), 56 U.S.L.W. 4527, 4528 (June 7, 1988).

Appeal jurisdiction lies where the state court has actually decided that a state statute as applied is not repugnant to the United States Constitution. *Charleston Fed. S. & L. Assn. v. Alderson*, 324 U.S. 182, 185-186 (1945); *Edwards v. Elliott*, 21 Wall. (88 U.S.) 532, 550-551 (1874); accord, *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 23 (1974); *Poulos v. New Hampshire*, 345 U.S. 395, 403 (1953).

Where the lower courts actually decide a federal question, it is irrelevant how or when it was raised. *Orr v. Orr*, 440 U.S. 268, 274-275 (1979); cf., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159, n. 5 (1980).

A fair reading of the opinions shows that the state courts relied on decisions of this Court under Fourteenth Amendment tests to uphold the validity of section 7017(d)(2). That allows this Court to reach the merits. Cf., *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *California v. Mitchell Bros' Santa Ana Theater*, 454 U.S. 90, 92 (1981). It is enough that the necessary effect of the judgment is to uphold the statute or to deny a constitutional claim, even if validity is not declared in direct terms. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

2. Certiorari jurisdiction lies because the courts below decided appellant was not denied equal protection

Alternatively, the Court has certiorari jurisdiction, 28 U.S.C. § 2103, because it was held that appellant had not been denied any constitutional rights. J.S. 45a-48a, 6a-7a, n. 2. Therefore, the appeal may be treated as a petition for a writ of certiorari and the merits decided. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. ___, ___, (1988), 56 U.S.L.W. 4418, 4420 (May 17, 1988) (probable jurisdiction noted); *Kulko v. Superior Court*, 436 U.S. 84, 90, n. 4 (1978) (jurisdiction postponed).

The California courts, on both appeals, realized federal constitutional issues were involved. Chapter and verse need not be cited. *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, n. 9 (1982). Here there is no doubt. *Webb v. Webb*, 451 U.S. 493, 501 (1981); cf., *Bankers Life and Casualty Company v. Crenshaw, supra*, 56 U.S.L.W. at 4420; *Taylor v. Kentucky*, 436 U.S. 478, 482, n. 10 (1978).

The facts necessary to address the issues also are fully developed in the record. Therefore, no policy militates against considering the issues. *Bankers Life and Casualty Company v. Crenshaw, supra*, 56 U.S.L.W. at 4420-4421; *Illinois v. Gates*, 462 U.S. 213, 217-222 (1983).

3. The Court may review the California Supreme Court's constitutional rulings as well as the Court of Appeal's because the first appeal was not ripe for review

The California Supreme Court decision was not final and ripe for review here. The case was remanded for

further proceeding on state law. The application of the best interest/detriment test could have given rise to further federal issues.

The test of finality is whether the judgment is subject to further review; whether it is a final judgment of a final court. *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Where the state court has passed on constitutional issues on a first appeal, remanded for further proceedings, and then refused to reconsider the previous decision on the second appeal, this Court may consider the issues on review of the second appeal. That is true even if the claim was not renewed. The fact that the first decision became law of the case in state court does not limit the ability to review now the substantial federal questions raised or passed on in earlier stages of the litigation. *Barclay v. Florida*, 463 U.S. 939, 946 (1983); *Hathorn v. Lovorn*, 457 U.S. 255, 261-262 (1982); *Reece v. Georgia*, 350 U.S. 85, 86-87 (1955). That is the precise situation at bar. J.S. 6a-7a, n. 2.

The procedural situation at bar is virtually identical to *Time, Inc. v. Firestone*, No. 74-944, discussed by Mr. Chief Justice Rehnquist, dissenting, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 501, 511-512 (1975). The Florida Supreme Court had rejected a first amendment defense to a libel action and remanded for further proceedings on state law issues. After the second state court appeal, this Court granted certiorari and decided the first amendment issue. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See also, *Kirkpatrick v. Christian Homes of Abilene,*

Inc., 460 U.S. 1074 (1983) where further proceedings might moot the issue.

Appellant submits that jurisdiction lies to consider the equal protection issues on either appeal or writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of § 1 of the Fourteenth Amendment to the United States Constitution. J.S. 3. The proceedings in California applied California Civil Code sections 7004, subdivision (a), J.S. 70a; section 7006, subdivision (c), J.S. 71a; and section 7017, subdivision (d)(2), J.S. 70a, the primary statute involved, as construed to include section 4600, subdivision (c). J.S. 70a.

STATEMENT OF THE CASE[3]

The Statutory Scheme

Edward had no right to initiate a proceeding to establish his paternity and get custody or visitation. Only when the mother decided to relinquish Katie for adoption did any rights for him commence. J.S. 43a, 44a, 49a; § 197, SA 1b; § 7006, J.S. 71a.

[3] The facts essentially are undisputed. Summaries by the courts below are at: J.S. 2a-6a, 36a-37a, and 51a.

If identified to the satisfaction of the court, a father must be given notice and a hearing. J.A. 39a, 43a. Only then does he have the right to assert paternity and seek custody, assuming full parental responsibility.

To terminate his parental rights by permitting adoption without his consent, it must be shown by clear and convincing evidence that custody with a third party is required to serve the best interests of the child and that custody with the father will be detrimental to the child. J.S. 48a, 70a.

A mother's consent is always required. A presumed father's consent is always required, too. J.S. 72a; § 224, SA 2b; § 232, SA 3b. Edward could become a presumed father only if he got custody.

A father may become a presumed father only with the consent of the mother. It requires marriage, attempted marriage, or taking the child into his home and openly holding it out as his own, i.e., having custody which he can get only with the mother's consent. J.S. 70a-71a.

Without custody, Edward loses his parental rights. Mothers and presumed fathers may lose their parental rights only after proof by clear and convincing evidence, § 232, SA 9b, of some incapacity, neglect, or abandonment. § 224, SA 2b; § 232, SA 3b; Cal. Welf. & Inst. Code, §§ 300, SA 10b, 360, 366.26.

The Thwarted Relationship

Edward and Katie's mother dated for a few months in the Fall of 1980, ending the relationship in November.

J.S. 36a. Neither knew then of the pregnancy. The mother never told Edward she was pregnant. J.S. 36a.

Katie was born July 18, 1981. Edward was named as the father on the birth certificate. R.26793, C.T. 4. The mother talked to the County adoption worker on July 20th, R.26793, R.T. 8, and decided to relinquish Katie for adoption. She was placed in foster care July 21st, not yet with the prospective adoptive parents. On August 1st, the mother told Edward of the birth and asked that he relinquish his rights to permit adoption. She wanted the child adopted by someone neither of them knew. R.26793, R.T. 10.

Edward called the adoption worker on August 3rd, R.26793, R.T. 9, 30, and met with her August 5th. At first he did not want to take physical custody because he had actual custody, though not legal custody, of two young sons by his former marriage. R.26793, R.T. 27-28. Instead, he asked that his daughter be placed with his friends who did babysitting for his sons. He submitted a profile of them to be considered as adoptive parents. R.26793, R.T. 9-10.

He would not, however, relinquish Katie for adoption or waive any legal rights. R.26793, R.T. 31; C.T. 5. He was told to either relinquish his rights or wait for the County to bring legal action. R.26793, R.T. 31. He had no money to hire a lawyer to advise him. R.26793, R.T. 31.

The mother relinquished her daughter on August 5, 1981. R.26793, R.T. 10.

Edward met again with the adoption worker August 10th. He had learned that the mother had relinquished

Katie so he might never see her. He was seeking counsel from the adoption worker and various other people "to get my feelings together since I had only learned about the pregnancy so quickly." R.26793, R.T. 32. He also wanted to know his legal rights, including the right to counsel. R. 26793, R.T. 14.

On August 17th, Edward was allowed a supervised visit with his daughter for 30-45 minutes. He met again with the adoption worker and told her he definitely wanted custody. R.26793, R.T. 32. On August 24th, Katie was placed with prospective adoptive parents. R.26793, R.T. 22. No investigation was ever made of Edward's suitability as a custodial parent. R.26793, R.T. 16, 24. He saw Katie for the next and last time on November 3, 1981. R.26793, R.T. 15.

The First Trial

A petition to terminate Edward's parental rights was filed by the County August 10, 1981, alleging he was the father. J.A. 3. The court-ordered investigation, J.A. 4, established that he had been named on the birth certificate, R.26793, C.T. 4-5; he alleged his paternity in his answer, J.A. 5; and paternity was stipulated at trial. R.26793, R.T. 3. He proved his paternity. J.A. 7.

Edward's answer also sought legal and physical custody. He wanted his parental rights preserved. J.A. 5.[4]

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[4] No objection was ever made to the timeliness of the pleading nor to its adequacy to seek a determination of paternity or award of custody to Edward, with preservation of his parental rights. § 7006(c), J.S. 71a; § 7017(d)(2), J.S. 72a.

Edward continued to seek full custody and parental rights at the trial, when Katie was still only 5 months old. R.26793, R.T. 31-32, 35, 37, 42, 43. (His sons were returning to live with their mother that day. R.26793, R.T. 28.) He had received support from his pastor, relatives and friends. R.26793, R.T. 42-45.

Edward felt that a natural parent should care for his children, and did not want to be cut off forever. R.26793, R.T. 42. Edward had expressed that fear when telling the adoption worker on August 17th that he wanted custody. R.26793, R.T. 32. "I feel that it is very important for a natural father to have that input into a child's life." R.26793, R.T. 37.

The trial court found that Edward had shown himself to be "a good and loving parent (who) can provide a good, loving home for" Katie. R.26793, R.T. 65; J.A. 7, 11. Further, the homes presented, Edward's and the prospective adoptive parents' (who did not testify but were described by the adoption workers. R.26793, R.T. 12, 22), were "more or less equally balanced as far as their (sic) quality of life that they can afford this child." R.26793, R.T. 65.

But Edward had failed to carry his burden of proof of showing by a preponderance of the evidence that it would be in the best interests of the child for him to have custody. J.A. 7-8. The court found it would be best to leave Katie with her prospective adoptive parents. The adoption workers had testified it was best not to move her. R.26793, R.T. 12, 22. So Edward's parental rights were terminated: her adoption could proceed without his consent. J.A. 7, 10; J.S. 64a.

The First Appeal

On appeal, the California Supreme Court reversed. Section 7017(d)(2) was read to be a statute for determining custody rights. Edward had to win custody which would make him a presumed father, requiring his consent to adopt. Therefore, as in all California custody proceedings, the parental preference rule applied. § 4600(c), J.S. 70a, 39a-40a, 48a-49a.

Thus, to give custody to a nonparent, the court must find it is in the best interests of the child and that custody to a parent would be detrimental to the child.

The California Supreme Court went on to review the decisions of this Court concerning the rights of unwed fathers under the United States Constitution. J.S. 45a-48a. No due progress violation was found. J.S. 47a. As construed, to require a finding of detriment and best interest, the statute was found to meet all other constitutional requirements, this Court never having ruled on a similar factual situation nor on the best interests/detriment to the child test as sufficient without the need for a finding of parental unfitness. J.S. 47a.

The best interest/detriment standard was found adequate to protect the father's right to the opportunity to care for his child and to develop a relationship, which arises once he manifests a significant parental interest. J.S. 48a-49a.

The judgment was reversed, however, because there was not sufficient evidence to justify depriving Edward of custody, and hence his parental rights, as of the time of

trial. J.S. 49a. The case was remanded for further proceedings to take evidence on subsequent circumstances, particularly the relationship of the child to the prospective adoptive parents. J.S. 49a, n. 12.

The Second Trial

As of the further hearing in February of 1985, J.A. 12, Katie had been with the prospective adoptive parents continuously since placed there by the adoption workers August 24, 1981. R.D003076, R.T. 23. All of Edward's visitation requests and requests for pictures and information had been refused. R.D003076, R.T. 45, 46-48, 62, 165-167.

Because of the long time Katie had been in the pre-adoptive home, she had formed strong ties: bonded. The court found it would be detrimental to remove her and give custody to Edward. J.A. 23-24.

The court relied on the County's expert witness, giving his testimony more weight than Edward's experts'. J.A. 23. Nevertheless, the court encouraged the prospective adoptive parents to make Edward part of Katie's extended family which they said they would do. J.A. 24.[5]

The County's psychiatrist, a regular consultant for them, R.D003076, R.T. 71-72, opined that Katie would be seriously psychologically harmed if custody were given to Edward, immediately or after a slow transition period.

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[5] No visitation has been permitted since the second trial, despite requests and a motion for visitation pending appeal which was denied. San Diego Superior Court file no. A24905.

R.D003076, R.T. 104. His opinion was based largely on studies of 15-30-month-old children who had been removed from their parents, J.A. 14, although Katie was then 43 months old.

The County's expert felt that visitation by Edward would be beneficial to Katie, R.D003076, R.T. 97, 105-106, 108, but it should be, he felt, at the discretion of the adoptive parents. Court-ordered visitation might occasionally inconvenience the adoptive parents or Katie. The adoptive parents would not have complete control, if the court ordered visitation, and Katie might be planning to have friends sleep over. R.D003076, R.T. 107. Still, both prospective adoptive parents thought Katie would benefit from knowing her father. R.D003076, R.T. 47-48, 63-65. They said a visitation plan could be worked out. R.D003076, R.T. 97.

Edward's expert witnesses, a clinical psychologist, R.D003076, R.T. 113-114, and an experienced social worker, R.D003076, R.T. 154-156, believed any psychological effects on Katie would not be that serious. The effects could be ameliorated, especially by a transitional program, and Katie would do well with Edward. The fact that he was a good father would help a lot. R.D003076, R.T. 121-122, 123-126, 156-159. Nothing in the record showed Edward to be other than the same good, loving father he was at the first trial. J.S. 6a.

The trial court again found bonding and concluded there would be extreme psychological harm to Katie from any change of custody, with or without a gradual transition program. The prospective adoptive parents were

encouraged to include Edward in Katie's extended family. J.A. 24.

The Second Appeal

A divided Court of Appeal affirmed. Although Edward had "done everything he reasonably could have to establish a parent-child relationship with Katie," J.S. 12a, the court was bound by the law of the case. All constitutional issues were resolved against him by the California Supreme Court and the Court of Appeal could not reconsider them. J.S. 6a-7a, n. 2.

The court could consider only whether the record contained substantial evidence to support the finding of detriment to the child. J.S. 7a. The definition of detriment did not require a finding of "negative evidence regarding the father, evidence which is admittedly lacking in this case." J.S. 8a.

The dissent believed the constitutional issues forming the basis for the parental preference rule required reversal. J.S. 24a. Because Edward had done nothing adverse to his parental rights, the mother was given complete control to deny his rights. J.S. 25a-26a. Further, there was not substantial evidence to support a finding of detriment sufficient to terminate parental rights. J.S. 29a. A transitional change of custody would be appropriate and sufficient to protect Katie. J.S. 34a.

SUMMARY OF ARGUMENT

Edward McNamara wants his parental rights restored so he can be part of Katie's life and she can be part of his life. He probably would not get custody, at least for now, because Katie has been with her present custodians for 7 years. But he could still contact her and visit her, lending financial support and making a father's unique contribution of moral, emotional, and psychological support. All children can use all of the love they can get. Perhaps she would want to live with him in the future. In any event, they could develop a life-long father-daughter relationship.

Edward wants to be a fully responsible participant in Katie's life. He came forward promptly to assume full parental duties. He asked the County for custody. He responded to the proceeding to terminate his parental rights by claiming paternity (he was adjudicated the father, legitimizing her in the usual sense), and asking for custody. That made him fully liable for support if his rights were not terminated.

He definitely is not a disinterested or casual father simply trying to veto an adoption, which has failed before. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Edward crossed the threshold to full fatherhood by accepting full parental responsibilities promptly. He did all he could, all the law and circumstances required and allowed. J.S. 12a. That gave him a constitutionally protected liberty interest in his parental rights and relationship with Katie and the opportunity to develop a personal relationship. *Lehr*, 463 U.S. at 261-262. Indeed,

the California statute gave him standing to seek parental rights – recognized him as a father – only if he accepted full responsibility, by admitting paternity and seeking custody, which he did eagerly.

The issues presented are equal protection claims because Edward got a hearing. He got an excess of process, 7 years in the courts, and eventually lost Katie only because of the mistakes and delays of the courts, J.S. 6a, 13a, 15a, n. 1, 49a-50a: a classic case of justice delayed is justice denied.

Once Edward got his hearing, the question became: what is the hearing about? What rights does he have? What standards, tests, or criteria are to be used to decide if his parental rights are to be terminated? Edward contends that the Equal Protection Clause of the Fourteenth Amendment entitles him, as a father who has achieved a protected interest and right to develop a personal relationship, to the same right to withhold his consent to adopt as the mother and presumed fathers, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979), and to have his parental rights terminated only on the same grounds as the mother and presumed fathers. § 224, SA 2b; § 232, SA 3b. *Stanley v. Illinois*, 405 U.S. 645, 649, 658 (1972).

But California gave the mother complete control. She may always veto an adoption. § 7017, J.S. 72a. The unwed father may seek parental rights only if she relinquishes for adoption. J.S. 43a. She kept Edward from getting Katie after she released her for adoption, merely because she wanted the child to go to someone who knew neither her nor Edward. J.S. 36a.

Presumed fathers, who marry or try to marry the mother or are allowed to take the child into their home, § 7004, J.S. 70a, have the same rights as mothers. All must consent to adoption and may lose their parental rights only on proof of specific conduct affecting the child; some inability or unwillingness to parent usually described as parental unfitness, or abandonment.

But Edward lost all parental rights because it was, according to the trial judge, in the best interests of the child and custody at that time with Edward would be detrimental to her; the latter because she was emotionally attached to her custodians: bonded. That is California's best interests of the child test applied in custody proceedings. J.S. 39a, 48a. But there is no loss of parental rights in a custody proceeding. The rights are retained, custody may be modified on a change of circumstances, and visitation is permitted.

A permanent loss of rights should not be based on current, changeable circumstances; there is no justification for using the standard. Moreover, the standard is vague, ill-defined, disputed and subject to arbitrary application. The best interests test, even with a finding of detriment, gives significantly less protection to parents than the unfitness test described with particularity and applied to others.

The State's legitimate interests are served when the child is found a good, loving home, which Edward offered. There is no legitimate interest in terminating the rights of a capable father willing and able to make a full commitment to the responsibilities of fatherhood just to promote adoptions.

Edward is entitled to equal protection. He should be allowed to establish that precious, life-long father-daughter relationship.

ARGUMENT

I. EDWARD HAS A PROTECTED LIBERTY INTEREST IN RAISING KATIE.

The constitutional view of family relationships was reviewed in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's own children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights.' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, 262 U.S. at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, 316 U.S. at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." *Id.*, at 651. See also, *Smith v. Organization of Foster Families*, 431 U.S. 816, 846-847 (1977).

Children have a fundamental interest in a relationship with their father, too. *Bowen v. Gilliard*, 107 S.Ct. 3008, 3021, 3024, 97 L.Ed.2d 485, 506, 509 (1987) (Brennan, J., dissenting). Termination of parental rights interferes with a "fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 754, n. 7 (1982). "(T)he private interest affected is commanding . . . " *Id.*, at 758.

II. EDWARD CROSSED THE THRESHOLD TO FULL FATHERHOOD, ACHIEVING A PROTECTED LIBERTY INTEREST BY COMING FORWARD TO TAKE FULL PARENTAL RESPONSIBILITY

A. An unwed father gains a protected parental interest by demonstrating a full commitment to the responsibilities of parenthood

The Court has required a demonstration of commitment to fatherhood to gain a protected interest. Mr. Stanley was undisputedly the father, had lived with his children, and had supported them. *Stanley*, 405 U.S. at 650, n. 4.

Mr. Quilloin did not take advantage of his ability to legitimize his child for 11 years. He never had custody, did not seek custody,[6] and provided support irregularly. He never "shouldered any significant responsibility . . . ,"

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[6] *Custody.* Although Edward asked for custody, undue emphasis should not be placed on that as a necessary element of accepting parental responsibility. Millions of fathers play significant roles with visitation and build life-long relationships. The mother here, of course, did not want her child, so only a custody request was initially available to Edward, which he eagerly accepted.

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nor took advantage of legal remedies available to establish his paternity. *Quilloin v. Walcott*, 434 U.S. 246, 251, 256 (1978). Therefore, the courts could consider the "extent of [his] commitment to the welfare of the child." *Id.* at 256; see, *Caban v. Mohammed*, 441 U.S. 380, 389, n. 7 (1979). It was held permissible to grant a stepfather adoption, over his objections, on the grounds that it was in the best interests of the child. *Id.* at 255.

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In some situations, perhaps the one at bar, custody with someone else might be best, but parental rights and contact could still be preserved. Perhaps a mother would want to keep custody and the father would still want parental rights. (Edward's inability to establish parental rights under the California scheme until the mother relinquished for adoption raises interesting due process and equal protection issues not presented where there has been a hearing for the father.) If it is best for the child to be in someone else's custody, at least for the present, a father should not be faulted – not denied basic civil rights – if he does not demand immediate custody. And not if he fails to get immediate custody because of current circumstances, either.

So long as the unwed father takes full legal responsibility and assumes all other responsibilities available to him, he should have a protected parental interest and a right to further develop the relationship. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 Ohio State L.J. 313, 351-352, nn. 294-300, 368, n. 416 (1984).

> "(T)he message is that if an unwed biological father is willing and able to perform those functions that society has always deemed critical for the protection and development of children, the Constitution requires the state to allow him to do so, initially and to continue doing so, in the absense of circumstances not of the state's own making." *Id.*, at 382, see, *Lehr*, 463 U.S. at 271, n. 3, 271-272 (White, J., dissenting).

Mr. Caban, however, was entitled to the same rights in an adoption proceeding as the unwed mother: a requirement that he consent to adoption unless he was found incompetent as a parent or abandoned his children. *Caban*, 441 U.S. at 385-386. To give him less protection was a denial of equal protection. *Id.*, at 382. "The effect***is to discriminate against unwed fathers even when their identity is known and they have manifested a significant parental interest in the child." *Id.*, at 394.

Mr. Caban had been named as father on the birth certificate, lived with the children, supported them, and petitioned to adopt. *Id.*, at 382-383. He had admitted paternity, established a substantial relationship, and participated in rearing his children. *Id.*, at 392-393.

Mr. Lehr, on the other hand, was not even entitled to a hearing because he had not availed himself of an available procedure to register as the father. *Lehr v. Robertson*, 463 U.S. 248 (1983). He was not named on the birth certificate, never supported the child, and rarely saw her. He never offered to marry the mother.[7] *Id.*, at 252.

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[7] *Marriage.* Attempts at marriage were not required of Messieurs Stanley and Caban. This mother eschewed marriage, J.S. 21a, and surrendered her child. A marriage proposed in these circumstances would have added nothing to Edward's demonstration of a full commitment.

Additionally, current societal mores do not require marriage. Many couples live together without marrying and many children born out of wedlock are reared successfully. Wheeler, *A Father's Right To Know His Child: Can It Be Denied Simply Because the Mother Married Another Man?*, 20 Loyola L. A. L. Rev. 705, 722 (April 1987). California recognizes these informal arrangements. *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal.Rptr.

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The threshold test for acquiring a protected liberty interest in parenthood was synthesized in *Lehr:*

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban,* 441 U.S., at 392. His interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he 'act[s] as a father toward his children.' *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. **** The significance of the biological link is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.*, 463 U.S. at 261-262.

Edward demonstrated a full commitment. He is entitled to the same protection as unwed mothers and other fathers under the Equal Protection Clause of the Fourteenth Amendment, just like Messieurs Stanley and Caban. He also was denied completely the opportunity to develop a relationship he valiantly is trying to grasp.

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815, 557 P.2d 106 (1976). California found no basis for distinguishing because of no marriage or attempt by Edward. J.A. 48a-49a.

B. Edward did all he could to establish a full legal and personal relationship with Katie

Seventeen days after learning of Katie's birth, Edward asked for full custody so he could raise her. That was 12 days after first talking to the adoption worker. In the meantime, he had sought counsel, personal and legal, from the adoption worker and others. He accepted his responsibilities although the mother and the County were urging him to shirk his duties.

He responded to the petition to terminate his parental rights by asserting his paternity, admitting the truth of the birth certificate, and asking for full custody. J.A. 5. Getting custody would have made him a presumed father, § 7004(a)(4), J.S. 71a, able to stop the adoption. It also, of course, would have made him fully liable to support Katie. § 196, SA 1b.

Unlike Messieurs Lehr and Quilloin, he assumed full responsibility and pursued all available legal remedies to establish his paternity. He is trying hard to be like Messieurs Stanley and Caban. He failed so far only because the statute allowed the mother full control and the County interfered.[8] He most certainly is not a disinterested father looking just for the right to veto an adoption.

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[8] *Newborns.* The fact that Katie was recently born means that Edward promptly did all that the law and the circumstances allowed and all that time allowed him to do to establish personal contact. Only the mother and the adoption agency, acting under the statutory scheme, prevented him.

Therefore, the issues of identifying fathers promptly or using more stringent tests to measure abandonment, *Caban,* 441 U.S. at 392, n. 11, do not arise on the record, or the statute,

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The courts below recognized that Edward had done everything he reasonably could to establish a parent-child relationship. J.S. 12a. He did everything required by the criteria of this Court. He is entitled to legal status and to develop personal contact. *Lehr*, 463 U.S. at 261; Wheeler, *op. cit.*, 20 Loyola L. A. L. Rev. at 718. Indeed, the California statute requires a full commitment, as described by the Court, even to get a hearing. § 7017(d)(2), J.S. 72a. The statute ought to confer parental rights and provide an opportunity for a personal relationship by its terms.

C. Acceptance of full parental duties carries reciprocal parental rights

Parental rights are linked to acceptance of parental responsibilities. *Lehr*, 463 U.S. at 257-258. When the father makes the commitment, the child has a right to rely on his unique contributions. *Bowen v. Gilliard*, 107 S.Ct. at 3023, 97 L.Ed.2d at 508 (Brennan J., dissenting). By accepting all parental duties, Edward undertook significant financial burdens, *Clark v. Jeter*, No. 87-5565 (1988), 56 U.S.L.W. 4527, 4528-4529 (June 7, 1988), unlike the typical father in a paternity proceeding who disavows any interest in providing financial, physical, and moral

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despite the California Supreme Court's attempt to distinguish on that basis. J.S. 45a, n. 8. There is no reason – no way on these facts – to require more or sooner than Edward did. (California makes no such more stringent requirements for newborns in other termination proceedings. § 224, SA 2b; § 232, SA 3b.)

support for the child. *Rivera v. Minnich*, 107 S.Ct. 3001, 3004-3005, 97 L.Ed.2d 473, 480 (1987).

Edward volunteered to undertake "a life-long relationship with significant financial, legal, and moral dimensions." *Id.*, at 107 S.Ct. at 3006, 97 L.Ed.2d at 482 (Brennan, J., dissenting). He assumed a "cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than a legal decree.*** It has***the potential to set in motion a process of engagement that is powerful and cumulative and whose duration spans a lifetime." *Id.*, 107 S.Ct. at 3007, 97 L.Ed.2d at 483 (Brennan, J., dissenting).

Despite the denial of Edward's rights and opportunities, he still has a protected interest and should be allowed as much opportunity as is still available to him.

III. THE DISTINCTIONS MADE BETWEEN UNWED FATHERS AND BOTH UNWED MOTHERS AND PRESUMED FATHERS SHOULD RECEIVE HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

A. Gender-based distinctions are examined with heightened scrutiny

To permit discrimination between unwed mothers and unwed fathers, the distinction must bear a substantial relationship to achieving important governmental objectives. *Caban*, 441 U.S. at 382, 388, 391. That is the test given to all gender-based distinctions. *Clark v. Jeter*, No. 87-5565 (1988), 56 U.S.L.W. 4527, 4528 (June 7, 1988). There must be exceedingly persuasive justification for the

classification. *Mississippi Universtiy for Women v. Hogan*, 458 U.S. 718, 724 (1982).

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.*, at 724-725.

The distinctions may not be based solely on differences that are irrelevant to the legitimate governmental objective. *Lehr*, 463 U.S. at 265.

B. The distinctions between fathers should be tested with heightened scrutiny

The Court has yet to examine the distinctions between unwed fathers with protected interests and other fathers as to withholding consent to adopt. *Caban*, 441 U.S. at 394, n. 16 (gender-based rejected); *Quilloin*, 434 U.S. at 255-256 (no manifestation of significant parental interest); but cf., *Stanley*, 405 U.S. at 658.

Appellant submits that the distinctions at bar should be reviewed with heightened scrutiny because of the basic civil rights at stake, *Stanley*, 405 U.S. at 651; rights "particularly important" and "more substantial than mere loss of money"; a "significant deprivation of liberty." *Santosky v. Kramer*, 455 U.S. at 756. Heightened scrutiny is generally applied to classifications based on illegitimacy. *Clark v. Jeter, supra*, 56 U.S.L.W. at 4528.

If a less stringent test is applied, the disparate treatment still must be rationally related to a legitimate governmental purpose. *Id.*, 56 U.S.L.W. at 4528. The distinctions then must rest on a fair and substantial relationship to the objective of the legislation so all persons similarly situated are treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451, 452-453 (1985); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The California statute does not pass either test.

IV. THE STATE'S INTEREST IS SERVED BY FINDING PERMANENT, LOVING HOMES FOR CHILDREN, WHICH EDWARD OFFERED

The legitimate state interests are served when a good, permanent home is provided for Katie. § 232.6, SA 10b; J.S. 20a; *Santosky v. Kramer*, 455 U.S. at 766; *Stanley*, 405 U.S. at 652, 657. Nothing is to be gained by completely separating Edward from Katie if he can provide good parenting, guidance, and emotional and moral support.

Adoption is merely a substitute when the biological family cannot be maintained. J.S. 20a-21a. Indeed, terminating parental rights to free for adoption does not even guarantee any particular, or any, home for the child. *Santosky*, 455 U.S. at 765, n. 15. The County argued at the first trial that the court did not have the power to decide custody in the proceeding. Even a denial of the petition to terminate parental rights did not give Edward custody, just the right to apply for custody later. R.26793, C.T. 35. The California Supreme Court agreed, J.S. 50a, despite the fact that Edward had to be entitled to custody against the world to keep his parental rights.

By stepping forward to take full responsibility, Edward met the test of *Lehr* and fulfilled the State's legitimate interest in caring for Katie. Buchanan, *op. cit.*, 45 Ohio State L. J., 363, n. 387, 367, nn. 402-404. The State defeats its own interest if it terminates parental rights when the parent is able to care for his child. *Stanley*, 405 U.S. at 652-653.

California admittedly had no legally cognizable interest in terminating Edward's parental rights in 1981. J.S. 20a, 48a-49a. There were no policy reasons to give the mother a veto of his desire to have Katie. J.S. 48a-49a. The judgment was reversed for lack of evidence.

The issue in the second trial was whether Edward should have custody, as of that time; not whether Edward had forfeited his rights, or was unable to care for Katie then or in the future. Current custody is not a State interest which justifies terminating all rights; it is a separate issue.

In this setting, the distinctions between unwed mothers (already rejected by the California Supreme Court, J.S. 48a-49a) and presumed fathers, and Edward and those like him (all who come forward under section 7017) serve no legitimate state objective requiring terminating parental rights.

V. THE DISCRIMINATION AGAINST NATURAL FATHERS IS IRRATIONAL AND SERVES NO STATE INTEREST

A. Giving complete control of the child to the mother serves no State interest

California gives complete control to the mother: title to child. He could not start a paternity proceeding. J.S.

43a-44a. She must consent if he is to become a presumed father: There must be a marriage or an attempt to marry, or she must allow him to take the child into his home so he may openly hold it out as his own. § 7004(a), J.S. 70a. Her consent is always needed to adopt. § 7017(d)(2), J.S. 72a. Edward could not get Katie from the County because the mother wanted the child to go to someone neither the mother or father knew, even after she relinquished the child. Only that gave Edward some legal rights, if he were willing to be a complete parent: absolute control even though the mother wanted nothing more to do with the child.

The treatment is as disparate and complete as the differing presumptions of fitness (and of the same kind where different standards are used) found a denial of equal protection in *Stanley*, 405 U.S. at 649, 658, and exactly the same kind of veto power to a mother without like power to an unwed father with protected interests invalidated in *Caban*, 441 U.S. at 394.

The California scheme allows a father's rights to be cut off by arbitrary action of the mother; it is an undifferentiated distinction applicable to all circumstances. *Ibid.* The distinctions are irrelevant to legitimate objectives and are distinctions with an important difference. See, *Lehr*, 463 U.S. at 265-266. It is an example of over-broad, gender-based generalization, *Caban*, 441 U.S. at 394, impermissibly carrying the "baggage of sexual stereotypes." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

This complete control is not based on any universal difference between maternal and paternal relations. A father may be a good parent, *Caban*, 441 U.S. at 389;

Stanley, 405 U.S. at 654-657; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975), even an unwed one. Herzog, *Some Notes About Unmarried Fathers*, 25 Child Welfare 194 (April 1966). "The actions of *both* parents after the birth of their child determine their ability to accept parental responsibility.***Her decision to release the child for adoption should not deprive the father of a meaningful opportunity to retain and develop his relationship." J.S. 48a-49a, emphasis original. Yet she has absolute title and he is subjected to a different and vague test for terminating parental rights. It makes no sense to presume that all natural fathers who are not presumed fathers are disinterested, J.S. 18a-19a; especially when he must manifest complete interest to get a hearing.

This mother opted out of parenthood at birth. Her status as a mother, and hence any differences she may have as a mother, should cease once she relinquishes. She should not be allowed unilaterally to interfere with the father's parent-child relationship. *Lehr*, 463 U.S. at 271, n. 3 (White, J., dissenting); Buchanan, *op. cit.*, 45 Ohio State L.J. at 361-362 ("(H)er interest should be considered no further in the adoption process"), *Id.*, at 366, n. 401. (In other parental rights terminations, state interference would prevent the finding of intent to abandon necessary to terminate. *In re George G.*, 68 Cal.App.3d 146, 160, 162, 164, 137 Cal.Rptr. 201 (1977); Buchanan, *op. cit.*, 45 Ohio State L.J. at 374, n. 468.)

The final balancing at bar is the wishes of a mother who has rejected further parenthood *versus* an able and loving father who promptly, on learning of the birth, eagerly sought all parental responsibility. She won because she wanted the child placed with someone else,

although he would serve well the child's interests and the State's. His interests in parenthood and a personal relationship, commanding interests, far outweigh hers. She serves only her own private concerns.

Yet, she wins because of her sex and the child's status; flimsy excuses for cutting off basic civil rights. That, appellant submits, is what equal protection is about: Edward was denied.

B. There is no rational basis for discriminating between defined presumed fathers and other unwed fathers who come forward to assume parental duties

All presumed fathers are given the same custody rights, § 197, SA 1b, and rights to withhold adoption consent as unwed mothers. § 7017(d)(2), J.S. 72a. Their parental rights may be terminated only for incapacity to parent, neglect, or abandonment on specified grounds with particular proof. § 224, SA 2b; § 232, SA 3b; Cal. Welf. & Inst. Code § 300, SA 10b.

The legislative presumption, upheld by California courts, is that many of the nonpresumed fathers, natural fathers, do not care about their children. The "class will contain a substantial portion of fathers who are strangers to the child and whose objections to adoption will be based on something other than a mature consideration of the child's best interest." *W.E.J. v. Superior Court*, 100 Cal.App.3d 303, 314, 160 Cal.Rptr. 862 (1979). But this assumption is not rational: "It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment

to adoption usually is the result of a natural parental interest***" *Caban*, 441 U.S. at 391-392. The statute requires that they be interested and caring. That is also required to get a constitutionally protected interest under the Court's cases. Edward disproved the presumption, too, by his conduct.

Further, his conduct, and the conduct required to get into court, show a greater commitment to the child than necessary to become a presumed father. If married, the marriage may have been terminated 300 days before birth. If not married, but the father has attempted marriage, the same applies. Not all will know of the birth. Where marriage is attempted after birth, the father must consent to having his name on the birth certificate or have a written, voluntary agreement to support the child. Or he may take the child into his home and openly hold her out as his. J.S. 70a-71a.

Edward did not offer to marry, but his law suit to establish paternity must be the equivalent promise. Marriage was not an option for him: Katie had been surrendered. He certainly ratified his name on Katie's birth certificate. And he openly held her out as his child and tried all he could to get her into his home. That serves the State's interest and makes him more committed than many presumed fathers.

It makes no sense to work the presumption against him, denying him individualized proof. *Stanley*, 405 U.S. at 647. The California statute casts too wide a net. The very definition of men whose rights are to be considered takes them out of the presumption, but it is applied anyway.

Further, there is no reason to believe that a child raised by her natural father who was never married to or lived with the mother will thrive any less than one raised by a father who was once married to the mother. *Stanley*, 405 U.S. at 654, n. 7.

The classification is overbroad and misapplied. It does not relate to the stated objective: no vetoes if not interested in the child, *W.E.J. v. Superior Court, supra*, 100 Cal.App. 3d at 314; *Caban*, 441 U.S. at 394; *Stanley*, 405 U.S. at 654. All distinctions between presumed fathers and those who achieve a protected paternal interest by manifesting significant parental interest should be stricken. Particularly, all should lose their parental rights only on the same evidence.

C. Terminating Parental Rights Because Of Current Circumstances Regarding Custody Is Irrational

There simply is no rational basis for terminating parental rights based on a custody standard, as done here. J.A. 10. That is what the best interest standard is, even with the requirement of a finding of detriment. J.S. 48a; *In re B. G.*, 11 Cal. 3d 679, 695, 114 Cal.Rptr. 444, 523 P.2d 244 (1974).

In other termination proceedings specific proof is required of the elements justifying termination. *In re Carmaleta B.*, 21 Cal.3d 482, 492-493, 496, 146 Cal.Rptr. 623, 579 P.2d 514 (1978); *In re David C.*, 152 Cal.App.3d 1189, 1210-1211, 200 Cal.Rptr. 115 (1984). But custody awards are discretionary. 6 Witkin, *Sum. Cal. Law*, Parent and Child, § 72 (8th ed. 1974). That means an order not

beyond the "bounds of reason," *In re Marriage of Connolly*, 23 Cal.3d 590, 597-598, 153 Cal.Rptr. 423, 591 P.2d 91 (1979); rarely reversible. 9 Witkin, *Cal. Procedure*, Appeal, § 275 (3d ed. 1985).

Further, custody is always modifiable, § 4600, and visitation is permitted. § 4601. Adoption is final; all rights end. § 229. The action is severe and irreversible, no matter what the father's circumstances, or the child's, might be later. J.S. 48a; *Stanley*, 405 U.S. at 648-649; *Lehr*, 463 U.S. at 270 (White, J., dissenting).

Any father who is not interested or cannot provide paternal care will walk away and not contest termination. Those who do are more interested and likely more capable than those whose rights might be terminated in other proceedings. The State purpose is the same, though. There is no reason to treat them, mothers and presumed fathers, differently.

The stakes – the rights – at issue in termination proceedings are dramatically different from custody matters. An unwed father may lose all rights because of present, changeable circumstances. Even visitation is denied. All because he is a man and unwed: carry-over stereotypes. A loving, committed father is entitled to more.[9]

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[9] *Amended statute.* The statute has been amended to give him less. J.S. 13a-14a. Natural fathers no longer get the parental preference, and custody qualifications are not an issue. Only the best interests test, without a need for a finding of detriment, is considered in terminating his parental rights. The former statute was applied to Edward, J.S. 7a, but the new statute raises even more serious constitutional questions.

VI. HAVING CROSSED THE THRESHOLD TO FATHERHOOD, EDWARD IS ENTITLED TO THE SAME GROUNDS FOR TERMINATING HIS RIGHTS

A. A like finding of unfitness should be required to terminate the rights of a protected paternal interest

The Court has reserved ruling on the requirement of a finding of parental "unfitness" to terminate parental rights. *Caban*, 441 U.S. at 394, n. 16 (statute invalid on equal protection grounds); *Santosky v. Kramer*, 455 U.S. at 760, n. 10 (judgment not rendered on "best interest" grounds); *Quilloin*, 434 U.S. at 255 (father had not achieved a protected interest, so adoption in the "best interests" of the child permissible.) The cases, however, express doubt about the validity of such a standard for fathers who have protected interests.

Fathers with protected interests, however, are entitled to the same grounds or rights to object as other parents, and the "best interests" test is not sufficient protection. *Caban*, 441 U.S. at 394; *Stanley*, 405 U.S. at 658.

Although California does not use the term "unfitness" in most of its statutes, the conduct required to terminate is well within the traditional use of that term. Specific conduct is described, § 224, SA 2b; § 232, SA 3b; Cal. Welf. Inst. Code § 300, SA 10b, and specific, clear and convincing proof is required. *In re Carmaleta B., supra*, 21 Cal. 3d at 492-493.

Generally, these conditions may be described as some parental incapacity, neglect, or abandonment. Edward

argued that some negative evidence regarding him was required. J.S. 8a. The dissent below argued that there must be something wrong with the natural parent personally or with his or her circumstances that would detrimentally impact the child. J.S. 24a, 29a.

In *Caban* the New York test was parental incompetence or abandonment. 441 U.S. at 385-386. In Illinois, the test of unfitness was neglect. *Stanley*, 405 U.S. at 650. Unfitness might also be described as unwillingness or inability to care for the child. Buchanan, *op. cit.*, 45 Ohio State L. J. at 316, n. 14. Some such finding is the usual basis for terminating parental rights. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 Fam. L. Q. 245, 284-285 (Fall 1985).

There was no such evidence against Edward; just the opposite. J.S. 8a, 49a. Yet he was deprived of all possibility of contact with Katie, after crossing the threshold to fatherhood drawn by the Court. That is contrary to *Stanley* and *Caban*.

B. The best interests test is different, irrational for these proceedings, and promotes no State interest

The best interest test is a custody standard. Mistakes may be corrected and visitation granted; all involved parents remain in the child's life. The term is noble and high-minded – we all want the best for children – but the application is confusing, uncertain, and subject to arbitrary definition from case to case.

There is continuing debate among psychologists as to what is in the best interests of children. *Lehr*, 463 U.S. at 262, n. 18. Opinions change regularly. The experts at trial

disagreed as to Katie's interests and whether the effect of a change of custody with a transitional period would be so adverse as to preclude the possibility forever. Other experts disagree, too, as the process goes through study and application: the normal thesis, antithesis, synthesis process of social (and legal) development. Garrison, *Why Terminate Parental Rights?*, 35 Stanford L. Rev. 423, 459, nn. 164-165 (Feb. 1983). The term is vague and arbitrary and should be rejected.

> "In the absence of legislative definition, decisions merely reflect each judge's own 'folk psychology.' As a result this standard promotes excessive, and often discriminatory, removal. It also permits judicial decisions to be based on value judgments not commonly held by society or approved by the legislature." Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stanford L. Rev. 623, 650, n. 124 (April 1976).

We are unable to predict accurately human behavior and lack a social consensus about the values that should shape our decisions. "(T)he very lack of consensus about values that makes the best-interests standard indeterminate may also make the formulation of rules inappropriate: a legal rule must, after all, reflect some social value or values." Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law and Contemporary Problems 226, 264 (Summer 1975).

> "Unlike the standard of 'parental fitness' which imposes a high burden on the state in an adversary proceeding, the standard of 'best interest' of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse." *In re J.P.*, 648 P.2d 1364, 1376

(Utah 1982); see also, *In re Jones*, 34 Ill.App.3d 603, 340 N.E.2d 269, 273 (1975); *In re Adoption of Baby Boy C.*, 31 Wn.App. 639, 644 P.2d 150 (1982).

California courts have changed their views on how custody should be decided, too. *In re B. G., supra*, 11 Cal.3d at 693-699.

Whatever the utility of the best interests standard for modifiable custody orders, usually in divorce, it is not appropriate here; it is too subject to abuse. Buchanan, *op. cit.*, 45 Ohio State L. J. at 346-347. Because there supposedly is to be no one to compare the unwed father to, J.S. 50a, he ends up having to prove he is the most suitable parent available, as a practical matter. *Stanley*, 405 U.S. at 648. His rights are at the unfettered discretion of the trial judge subject to review only under the substantial evidence test, difficult to reverse for different results on nearly identical facts. *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 429, 45 P.2d 183 (1935).

It is incumbent on the State to specity what parental conduct justifies termination of parental rights, to satisfy due process requirements. *Roe v. Conn*, 417 F.Supp. 769, 780 (M.D. Ala. 1976) (three-judge court).

> "When is a home an 'unfit' or 'improper' place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views." *Ibid.*

If ordinary people may differ over unfitness, their diverse views on the best interests of children are likely

to be chaotic. The California legislature has defined unfitness through its statutes. Unwed fathers with protected liberty interests are entitled to no less.

Because the right to fair and equal grounds for rights termination is a substantive one, it is entitled to equal protection, too. *Stanley*, 405 U.S. at 658. That seems plain when the State has meticulously articulated the grounds for dispensing with the need for other parents to consent to adoption.

C. Adding a detriment finding does not make the best interests test any clearer or make it the same as a finding of unfitness

The requirement of a finding of detriment does not make the best interest test the equivalent of unfitness. It still is not like those statutes at all.

The requirement of a detriment finding was incorporated into the best interest test. It is not an independent standard. The purpose was to avoid comparisons of parents to others who might seek custody. The requirement of a finding of unfitness was dropped. *In re B. G., supra*, 11 Cal.3d at 693-699. There is much disagreement over its application, particularly to termination of parental rights.

Much of the controversy has been about bonding, the disputed fact issue below. The judges of the Court of Appeal disagreed on the definition of detriment to be applied and what definition was required to meet federal constitional requirements. J.S. 7a-14a, 24a-33a: the straight custody definitions, or adding some act or omission of the father, negative evidence. They also disagreed on whether Katie could make a successful transition to

Edward's custody after bonding, getting emotionally attached to someone else.

The Court of Appeal judges also disagreed on the application of a California Supreme Court case applying the detriment standard. *Michael U. v. Jamie B.*, 39 Cal.3d 787, 218 Cal.Rptr. 39, 705 P.2d 362 (1985). That application of the detriment standard resulted in three opinions for the five concurring justices plus a dissent for the other two. The courts disagree sharply on whether bonding should be a basis for terminating rights. See, *Id.*, at 801 (Reynoso, J., dissenting).

Removal of Katie from the pre-adoptive home would not have been sufficient detriment at 5 months, as a matter of law, J.S. 49a, or apparently at 2½ years. J.S. 15a, n. 1. Other cases have held there would not be sufficient detriment, or no detriment at all, from terminating the relationship with the primary caretaker at 1½ years (to trial), *In re Marriage of Halpern*, 133 Cal.App.3d 297, 302-303, 311, 184 Cal.Rptr. 740 (1982), or at 3½ years (to time of appeal), *In re Cheryl E.*, 161 Cal.App.3d 587, 594, 607, 207 Cal.Rptr. 728 (1984) (despite social workers' opinions to the contrary, where the parent was loving and capable). "If a child's immediate bonding or attachment to foster parents could outweigh all other considerations***(a)t best the court would merely pay lip service to the concept of parenting as a fundamental constitutional right. A dependent child's psychological bond with a foster parent may not be so easily used to satisfy the requirement" of detriment to terminate parental rights. *In re Venita L.*, 191 Cal.App.3d 1229, 1240, 236 Cal.Rptr. 859 (1987) (child 2½ at trial, nearly 4 when appeal decided).

> "I reject the idea that the ordinary consequences of removing a child from a settled home can constitute, *by themselves*, the kind of 'detriment' which justifies the forced termination of parental rights. The majority's analysis of this issue furnishes a rationale for unwarranted intrusion in all kinds of custody cases into the 'private realm of family life which the state cannot enter.' * * * * Situational emotional disturbance is likely to occur whenever a child undergoes a change of environment. If this were sufficient for termination of parental rights, the state could convert any temporary loss of custody into a permanent and irrevocable one." *In re B. J. B.*, 185 Cal.App.3d 1201, 1213, 1217, 230 Cal.Rptr. 332 (1986) emphasis original (Poché, J., concurring and dissenting) – that, of course, precisely describes Edward's situation.

Allowing termination of parental rights on such an ephemeral, dramatically different standard is patently inappropriate: a denial of substantive rights and equal protection.

VII. DECLARING THE USE OF THE BEST INTEREST/DETRIMENT TEST A DENIAL OF EQUAL PROTECTION WOULD LEAVE THE COURTS FREE TO DECIDE APPROPRIATE CUSTODY AND VISITATION ARRANGEMENTS

A. Parental rights should be decided on the threshold conduct of full parental commitment with custody decided on present circumstances

The history and treatment of a case previously before the Court on similar issues may provide some useful analytical framework. *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972). The Wisconsin Supreme Court had permitted termination of an unwed father's parental rights without notice, and the mother was given a veto. *State ex rel. Lewis v. Lutheran*

Social Services, 47 Wis.2d 420, 178 N.W.2d 56 (1970). The appeal was vacated and the case remanded for reconsideration in light of *Stanley* with "due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time." 405 U.S. 1051.

The Wisconsin court refused to decide the termination issue on the current circumstances. If custody were left with the adoptive parents, it had to be done on a basis other than the adoption decree. Termination of parental rights and custody are different issues. The adoption could be vacated and custody still left with the adoptive parents or given to the father. *State ex rel. Lewis v. Lutheran Social Services*, 59 Wis.2d 1, 207 N.W.2d 826, 829 (1973).

Termination of parental rights was to be based on the initial conduct towards the child, 207 N.W.2d at 831, not on the best interest test.

> "The phrase 'best interests of the child' means all things to all people * * * but the tendency in man is to apply intuition in deciding that a child would be 'better' with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being 'in the best interests of the child.' Courts have not laid down any definite guidelines which can be followed to insure protection of what the average person means by 'best interests of the child.' The 'best interests of the child' test does not speak in terms of the present, the immediate future, or even the ultimate future of the child." *Ibid.*

After further hearings, it was held that the father had abandoned the child by denying paternity and refusing to assist or marry the mother before the child was born.

State ex rel. Lewis v. Lutheran Social Services, 68 Wis.2d 36, 227 N.W.2d 643 (1975).

Edward's conduct should entitle him to retain his parental rights, as a matter of law, for having manifested full parental interest. Custody should then be decided separately.

B. Continuing contact with Katie will benefit her and allow Edward to develop a relationship

Because the California courts erroneously held that the statute was constitutionally valid under the Equal Protection Clause and that Edward had not been denied any constitutional rights, his parental rights should be restored. That leaves the question of custody.

It is doubtful that Edward would get custody at this time. The case has already been tried on custody standards and Edward lost. Katie has been with the prospective adoptive parents since August of 1981. But Edward can still develop a relationship through visitation. Not all he wanted, nor all he should have received in 1981, but still something significant.

He would be eligible to seek custody in the future if circumstances change. Perhaps Katie would want to live with him. Perhaps the custodians would become incapacitated, or possibly die, leaving Edward the natural successor. Perhaps a lot of factors could change: custody is changed often. Older children become more interested in their fathers. *Michael U. v. Jamie B., supra*, 39 Cal.3d at 801 (Reynoso, J., dissenting).

Most importantly now: he could visit. The experts and the custodians agreed that contact would be good

and important for Katie. The voiced reservations about court-ordered visitation, p. 15, *supra*, were innocuous; the kind millions adjust to daily. The trial court recommended it. Visitation would allow a parent-child relationship with a loving father.

Visitation is part of the custody powers, part of the parent-child relationship that goes with parental rights. *Caban*, 441 U.S. at 406, n. 13 (Stevens, J., dissenting); it may be all that ever will be available. *Cf., Michael H. v. Gerald D.*, No. 87-746, *appeal pending*, 191 Cal.App.3d 995, 1001, 236 Cal.Rptr. 810 (1987); see footnote 6, p.21, *supra*.

Visitation would permit Edward to make a valuable contribution to Katie's emotional, social, and moral development. The continuing contact is important. *Bowen v. Gilliard, supra*, 107 S.Ct. at 3024, nn. 9-10, 97 L.Ed.2d at 509-510, nn. 9-10 (Brennan, J., dissenting); Garrison, *op. cit.*, 35 Stanford L. Rev. at 425.

Neither custody or visitation is in issue here. But Edward still has protected parental rights which may be exercised with benefit to Katie.

CONCLUSION

The California statute, as written and as construed, denied appellant equal protection of the laws, on its face and as applied. The judgment should be reversed with directions to deny the petition to terminate parental rights, which will result in further proceedings to determine custody and visitation.

Respectfully submitted,

JAMES E. SUTHERLAND
Counsel for Appellant

STATUTORY APPENDIX

California Civil Code section 196.

Support and education of children; equal responsibility

The father and mother of a child have an equal responsibility to support and educate their child in the manner suitable to the child's circumstances, taking into consideration the respective earnings or earning capacities of the parents.

California Civil Code section 196a.

Father's obligation to support and educate; civil action to enforce

The father as well as the mother of a child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor child, and in such action the court shall have power to order and enforce performance thereof, the same as in a suit for dissolution of marriage.

California Civil Code section 197.

Custody, services, and earnings of child

The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.

California Civil Code section 224.

Consent of parents; when consent not necessary

A child having a presumed father under subdivision (a) of Section 7004 cannot be adopted without the consent of its parents if living; however, if one parent has been awarded custody by judicial decree, or has custody by agreement of the parents, and the other parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of the child when able to do so, then the parent having custody alone may consent to the adoption, but only after the parent not having custody has been served with a copy of a citation in the manner provided by law for the service of a summons in a civil action that requires him or her to appear at the time and place set for the appearance in court under Section 227; failure of a parent to pay for the care, support and education of the child for the period of one year or failure of a parent to communicate with the child for the period of one year is prima facie evidence that the failure was willful and without lawful excuse; nor a child with no presumed father under subdivision (a) of Section 7004 without the consent of its mother if living; except that the consent of a father or mother is not necessary in the following cases:

1. When the father or mother has been judicially deprived of the custody and control of the child (a) by order of the court declaring the child to be free from the custody and control of either or both of his parents pursuant to Chapter 4 (commencing with Section 232) of Title 2 of Part 3 of Division 1, or (b) by similar order of

the court of another jurisdiction, pursuant to any law of that jurisdiciton authorizing the order; or when the father or mother has, in a judicial proceeding in another jurisdiction, voluntarily surrendered his right to the custody and control of the child pursuant to any law of that jurisdiction provided for the surrender.

2. Where the father or mother of any child has deserted the child without provision for its identification.

3. Where the father or mother of any child has relinquished the child for adoption as provided in Section 224m; or where the father or mother has relinquished the child for adoption to a licensed or authorized child-placing agency in another jurisdiction pursuant to the law of that jurisdiction.

California Civil Code section 232.

Persons entitled to be declared free from parental custody and control

(a) *Description of persons.* An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:

(1) *Person abandoned by parents to care and custody of another; intent; support or communication with child.* The child has been left without provision for the child's identification by his or her parent or parents or by others or has been left by both of his or her parents or his or her sole parent in the care and custody of another for a period of six months or by one parent in the care and

custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child. The failure to provide identification, failure to provide support, or failure to communicate shall be presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In those cases in which the child has been left without provision for the child's identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child and citation by publication may be commenced. The petition may not be heard until after the 180th day following the discovery of the child.

(2) *Person neglected or cruelly treated by parents.* Who has been neglected or cruelly treated by either or both parents, if the child has been a dependent child of the juvenile court under any subdivision of Section 300 of the Welfare and Institutions Code and the parent or parents have been deprived of the child's custody for one year prior to the filing of a petition pursuant to this section. Physical custody by the parent or parents for insubstantial periods of time shall not serve to interrupt the running of the one-year period.

(3) *Person whose parents under disability due to use of alcohol or controlled substances or morally depraved.* Whose parent or parents suffer a disability because of the habitual use of alcohol, or any of the controlled substances specified in Schedules I to V, inclusive, of Division 10

(commencing with Section 11000) of the Health and Safety Code, except when these controlled substances are used as part of a medically prescribed plan, or are morally depraved, if the child has been a dependent child of the juvenile court, and the parent or parents have been deprived of the child's custody continuously for one year immediately prior to the filing of a petition pursuant to this section. As used in this subdivision, "disability" means any physical or mental incapacity which renders the parent or parents unable to adequately care for and control the child. Physical custody by the parent or parents for insubstantial periods of time shall not interrupt the running of the one-year period.

(4) *Person whose parents convicted of felony.* Whose parent or parents are convicted of a felony, if the facts of the crime of which the parent or parents were convicted are of a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child.

(5) *Person whose parents are declared to be developmentally disabled or mentally ill.* Whose parent or parents have been declared by a court of competent jurisdiction, wherever situated, to be developmentally disabled or mentally ill, if, in the state or country in which the parent or parents reside or are hospitalized, the Director of Mental Health or the Director of Developmental Services, or their equivalent, if any, and the superintendent of the hospital of which, if any, the parent or parents are inmates or patients, certify that the parent or parents so declared to be developmentally disabled or mentally ill will not be capable of supporting or controlling the child in a proper manner.

(6) *Person whose parent or parents are mentally disabled.* Whose parent or parents are mentally disabled and are likely to remain so in the forseeable future. As used in this subdivision, "mentally disabled" means that a parent or parents suffer any mental incapacity or disorder which renders the parent or parents unable to adequately care for and control the child. The evidence of any two experts, each of whom shall be either a physician and surgeon, certified either by the American Board of Psychiatry and Neurology or under Section 6750 of the Welfare and Institutions Code, or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, shall be required to support a finding under this subdivision. If, however, the parent or parents reside in another state or in a foreign country, the evidence required by this subdivision may be supplied by the affidavits of two experts, each of whom shall be either a physician and surgeon who is a resident of that state or foreign country, and who has been certified by a medical organization or society of that state or foreign country to practice psychiatric or neurological medicine, or by a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders and who is licensed in that state or authorized to practice in that country. If the rights of any parent are sought to be terminated pursuant to this subdivision, and the parent has no attorney, the court shall appoint an attorney for the parent pursuant to Section 237.5, whether or not a request for the appointment is made by the parent.

(7) *Person in supervised out-of-home placement for one year period.* Who has been in out-of-home placement under the supervision of the juvenile court, the county welfare department, or other public or private licensed child-placing agency for a one-year period, if the court finds that return of the child to the child's parent or parents would be detrimental to the child and that the parent or parents have failed during that period, and are likely to fail in the future, to maintain an adequate parental relationship with the child, which includes providing both a home and care and control for the child.

If the minor has been adjudged a dependent child of the juvenile court and placed in out-of-home placement pursuant to Section 361 of the Welfare and Institutions Code, the one-year period shall be calculated from the date of the dispositional hearing at which the child was placed in out-of-home placement pursuant to that section. If the minor is in placement under the supervision of a county welfare department or other public or private licensed child-placing agency, pursuant to a voluntary placement, as described in Section 16507.4 of the Welfare and Institutions Code, the one-year period shall be calculated from the date the minor entered out-of-home placement.

The court shall make a determination that reasonable services have been provided or offered to the parents which were designed to aid the parents to overcome the problems which led to the deprivation or continued loss of custody and that despite the availabilty of these services, return of the child to the parents would be detrimental to the child. The probation officer or social

worker currently assigned to the case of the child shall appear at the termination proceedings.

If the minor has been adjudged to be a dependent child of the court pursuant to Section 300 of the Welfare and Institutions Code, the court shall review and consider the contents of the juvenile court file in determining if the services offered were reasonable under the circumstances.

Trial placement of the child in the physical custody of the parent of visitation of the child with the parent during the one-year period when the trial placement or visitation does not result in permanent placement of the child with the parent, shall not serve to interrupt the running of the one-year period.

(8) *Minor found to be dependent child and reunification services not to be provided.* A minor who has been found to be a dependent child of the juvenile court and the juvenile court has determined, pursuant to paragraph (3), (4), or (5) of subdivision (b) of Section 361.5 of the Welfare and Institutions Code, that reunification services shall not be provided to the minor's parent or guardian.

(b) *Wishes and best interest of child; testimony of minor in chambers.* At all termination proceedings, the court shall consider the wishes of the child and shall act in the best interests of the child.

The testimony of the minor may be taken in chambers and outside the presence of the minor's parent or parents if the minor's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exist:

(1) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(2) The minor is likely to be intimidated by a formal courtroom setting.

(3) The minor is afraid to testify in front of his or her parent or parents.

After testimony in chambers, the parent or parents of the minor may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

The testimony of a minor also may be taken in chambers and outside the presence of the guardian or guardians of a minor under the circumstances specified in this subdivision.

(c) *Clear and convincing evidence.* A finding pursuant to this section shall be supported by clear and convincing evidence.

(d) *Nonapplication of § 5158.* Section 5158 shall not apply to proceedings pursuant to this section.

(e) *Nonapplication to dependent children of juvenile court on and after Jan. 1, 1989.* This section does not apply to minors adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360 on and after January 1, 1989, during the period in which the minor is a dependent child of the court. For those minors, Section 366.26 of this code and Section 7017 of the Civil Code provide the exclusive means for the termination of parental rights.

California Civil Code section 232.6.

Purpose of chapter; effect of declaration of freedom

The purpose of this chapter is to serve the welfare and best interests of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his or her life. A declaration of freedom from parental custody and control pursuant to this chapter terminates all parental rights and responsibilities with regard to the child.

California Civil Code section 7002.

Application regardless of marital status of parents

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

California Welfare and Institutions Code Section 300.

[The following are dependent children within the Juvenile Court's jurisdiction. One:]

* * * *

(B) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

* * * *

(D) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either

of his parents, or of his guardian or other person in whose custody or case he is.

(e) Who has been freed for adoption from one or both parents for 12 months by either relinquishment or termination of parental rights and for whom an interlocutory decree has not been granted pursuant to Section 224n of the Civil Code or an adoption petition has not been granted.

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(6)

No. 87-5840

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In The

Supreme Court of the United States

October Term, 1987

EDWARD MCNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

I. When a final decision of a state appellate court in a case terminating the rights of an unwed father upholds the validity of a state statute against federal constitutional attack and remands the case to the trial court on state law issues only and the aggrieved party waits until after trial on remand to seek review of the federal constitutional issues which could have been raised in the earlier appeal and are now raised far outside the 90 day statutory time period for appeal, does this Court have jurisdiction?

II. Are an unwed father's substantive due process rights violated by the termination of his parental rights if state law affords him an opportunity, which he did not grasp, to bring a filiation proceeding (Cal. Civil Code § 7006(c)) which then would have stayed the termination action and prevented the adoption?

III. Does a state's use in a termination of the rights of an unwed father proceeding of a detriment/best interests of the child standard without requiring a specific finding of unfitness on the part of the unwed father violate either equal protection or substantive due process?

IV. If a state makes a distinction between defined presumed fathers and other unwed fathers predicated on distinguishing those biological fathers manifesting unequivocal concern for their offspring and those who have not, does such a distinction violate equal protection?

V. If a state conditions adoption of a newborn on obtaining an unwed mother's consent without requiring such consent from the unwed father in view of the state's concern that providing a veto to equivocal unwed fathers would jeopardize the adoption process and place illegitimate newborns in a placement limbo, is equal protection violated?

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STATEMENT OF CASE

After two months of casual dating, appellant, the unwed father, and PAM[1] stopped seeing each other in November 1980. (R. 26793, R.T. 29.) Sometime during this two-month dating period, PAM became pregnant. Apparently, neither PAM nor appellant was aware of her pregnancy at the time they stopped seeing each other. PAM received no support from appellant during her pregnancy. Appellant and PAM were never married to each other, never attempted to marry each other and never cohabited. (R. 26793, C.T. 17.) Katie[2] was born on July 18, 1981.[3] While in the hospital, PAM requested adoption counseling services from the Adoptions Agency of the Department of Social Services of the County of San Diego ("Adoptions Agency") since she wished to place Katie for adoption. On July 20, 1981, PAM met with Ms. Joan Gray, a social worker with the Adoptions Agency, to discuss possible relinquishment and placement of Katie for adoption. PAM named appellant the father of Katie. At the request of PAM, Katie, age 3 days, was placed in a licensed foster home. The foster home was not that of the proposed adoptive parents. (R. 26793, R.T. 17.)

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[1] For the purposes of confidentiality and privacy the mother will be referred to by her initials "PAM". Appellee has utilized the record citation form as described in footnote 1 on page 1 of the Brief for Appellant.

[2] Katie is the name by which the child is known. At the time of her birth, the baby was known as Baby Girl M. The "M" refers to the surname of PAM; it does not refer to the surname of appellant.

[3] Assuming delivery was full term, conception would have occurred sometime during mid-October, 1980. At the time of conception, appellant was age 34, divorced and had physical, but not legal, custody of his two sons, approximately ages 2 and 4. At the time of the first hearing on December 18, 1981, the two sons were reclaimed by their mother and returned with her to live in northern California.

On August 1, 1981, PAM contacted appellant and told him that she had given birth to Katie. (R. 26793, R.T. 29-30.) PAM informed appellant that he was Katie's biological father. This was his first knowledge of the pregnancy. On August 3, 1981, appellant called Ms. Gray to schedule a meeting to discuss his legal rights as a biological father and to learn about PAM's plans. (R. 26793, R.T. 30.) Appellant met with Ms. Gray on August 5, 1981 (R. 26793, R.T. 9) and stated that the pregnancy came as a surprise to him. He stated that he supposed he was the father of Katie if PAM said he was. Appellant described his relationship with PAM as "casual" (R. 27693, R.T. 9, 32) and, but for one or two telephone calls and a short visit, he had not seen or communicated with PAM since they stopped seeing each other in November, 1980. (R. 27693, R.T. 29.)

At this first meeting, appellant stated *he did not want custody* of Katie because he was single, Katie was a girl and he was responsible for two other children. (R. 27693, R.T. 12.) Instead he wished Katie placed for adoption with a family who were the babysitters for his two children by a former marriage. (R. 27693, R.T. 10.)[4] Appellant asked that PAM be informed of and consider his wishes. (R. 27693, R.T. 10.) Ms. Gray advised appellant that he could relinquish the child for adoption, sign a statement denying paternity, *commence an action to establish the parent-child relationship* or wait until this type of proceeding was filed. (R. 27693, R.T. 31.) (Emphasis supplied.)

PAM was also interviewed on August 5, 1981 by Ms. Gray. After reviewing proposed adoptive placements, including the one suggested by appellant, PAM requested that Katie be placed with one of the families approved by

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[4] It appears that the family suggested by appellant to the Adoptions Agency did not know he had proposed they be allowed to adopt Katie. (R. 27693, R.T. 53.) In any event, this family did not follow through in making any application to adopt. (R. 27693, R.T. 11.)

the Adoptions Agency. On August 5, 1981, PAM signed a relinquishment.[5] (R. 27693, R.T. 10-11.)

Five days later, on August 10, 1981, appellant met with Ms. Gray for a second time. Again, his "legal rights" were discussed and he was informed that PAM had relinquished Katie for adoption. Appellant continued to express *no* interest in seeking custody of the baby himself and was unsure of what was best for the baby. (R. 27693, R.T. 14, 32.) On August 10, 1981, after the second time appellant had stated he did not want custody of Katie, a Petition to Terminate the Rights of a Father (TROF proceeding) was filed pursuant to California Civil Code section 7017.[6] The TROF petition alleged that Katie had been relinquished to the Adoptions Agency; Katie had no presumed father under California law; appellant was the natural father of Katie; and it would be in the best interests of Katie that the rights of appellant be terminated. The TROF petition requested that the trial court terminate the rights of appellant and order that only the consent of PAM was required for the adoption of Katie. (R. 27693, C.T. 1-3.)

On August 17, 1981, seven days after the commencement of the TROF proceeding, appellant met with Ms. Gray for the third time. For the first time, appellant expressed an interest in custody of Katie. He visited with Katie for approximately 30-45 minutes at the Adoptions

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[5] California law permits the father or mother to relinquish a child to a licensed adoptions agency for adoption. (Cal. Civ. Code, § 224.) A relinquishment is a signed, witnessed document which becomes final when filed with the California Department of Social Services. Once final, all parental rights and responsibilities with respect to the child are terminated and the relinquishment may be rescinded only by the mutual consent of the adoptions agency and the parent relinquishing the child. The adoption agency is entitled to the exclusive custody and control of the child at all times until a petition for adoption has been granted. (Cal. Civ. Code, § 224.)

[6] Unless indicated otherwise, all section references hereinafter are to the California Civil Code.

Agency. (R. 27693, R.T. 15, 32.) On August 24, 1981, Katie was placed in the home of Mr. and Mrs. Moses, the proposed adoptive parents. Katie has remained continuously in their home, a period of approximately seven years. On November 11, 1981, appellant again met with Ms. Gray and saw Katie for about 30-45 minutes. (R. 27693, R.T. 15, 32-33.) Appellant told Ms. Gray that he was going to contest the TROF proceeding. (R. 27693, R.T. 15; C.T. 8.)

The TROF proceeding was originally scheduled for hearing on November 16, 1981 but was continued to December 18, 1981. (R. 27693, C.T. 55.) The TROF proceeding was heard before the Honorable Judith McConnell, Judge of the San Diego County Superior Court. Appellant appeared and was represented by counsel. After hearing the evidence, the case was submitted for briefing. On February 9, 1982, the trial court issued its memorandum decision finding that there was no dispute that appellant was the biological father of Katie, that appellant was not a presumed father as defined by California law, and that appellant had failed to prove to the court that it was in the best interests of Katie that appellant be given her custody. The trial court found that only the consent of PAM was required for the adoption of Katie and granted the TROF petition. A judgment terminating the rights of appellant was signed on February 26, 1982. A Notice of Appeal was filed on March 19, 1982.

After a decision by the Court of Appeal reversing and remanding the case to the trial court, the Adoptions Agency sought a hearing in the California Supreme Court. On July 14, 1983, the California Supreme Court granted a hearing[7] and on October 22, 1984, issued its

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[7] Under California law at the time, the opinion of the Court of Appeal was vacated by operation of law on the granting of the Petition for Hearing by the California Supreme Court. (*People v. Rogers* (1978) 21 Cal.3d 542, 547, 146 Cal.Rptr. 732, 579 P.2d 1048.) Therefore, the opinion of the Court of Appeal in *In re Baby Girl M.* (1983) 141 Cal.App.3d 432, 191 Cal.Rptr. 339 does not appear in the official reports.

opinion. (*In re Baby Girl M.* (1984) 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 918.) The California Supreme Court noted that the California Legislature in enacting the California version of the Uniform Parentage Act (§ 7000 et seq.) had not specified the standard to be applied in a TROF proceeding. Relying on earlier decisions which had applied section 4600 to various types of custody proceedings (S.A. 8-10), the California Supreme Court concluded that section 4600 applied to all section 7017 proceedings. The California Supreme Court held that a trial court in deciding a TROF proceeding must first consider whether an award to a natural father would be detrimental to the child and then consider whether the termination would be in the best interests of the child. (*In re Baby Girl M., supra,* 37 Cal.3d at 67-68.) The California Supreme Court reviewed the cases of this Court "addressing cognizable interests of unwed fathers" and, while noting that this Court "has not directly considered a fact situation similar to ours," recognized that the California version of the Uniform Parentage Act satisfied federal due process requirements. (*In re Baby Girl M., supra,* 37 Cal.3d at 73-75.)

The California Supreme Court reversed the judgment of the trial court terminating the custodial rights of appellant and remanded the case to the trial court for further proceedings. The California Supreme Court noted that a review of the evidence at the time of the hearing would not have supported a finding of detriment. However, the California Supreme Court stated that because of the passage of time, "further evidence will be necessary . . . [and] circumstances leading to the earlier determination should be reviewed in light of subsequent events." (*Id.* at p. 76.) No appeal or other form of review was taken by appellant to this Court.

The second trial was held on February 25-27, 1985 before Judge McConnell. After hearing the testimony of witnesses and the argument of counsel for all parties, the trial court found that it would be detrimental to give custody of Katie to appellant and that it would be in Katie's best interests that she remain with the Moses family. (J.A. 22-24.) The trial court gave much weight to

the testimony of a child psychiatrist who testified that the removal of Katie from the only home she had ever known would cause extreme psychological and emotional harm to her. (J.A. 13-21.) The trial judge found the evidence "clear and convincing" and held that such harm constituted detriment within the meaning of section 4600. The trial court further found that it would be in the best interests of Katie that custody be awarded to Mr. and Mrs. Moses, who are "in almost every sense the true parents of this child." (J.A. 26-27.)

Appellant appealed the judgment to the Court of Appeal, which, on April 30, 1987, issued its opinion affirming the decision of the trial court. (*In re Baby Girl M.* (1987) 191 Cal.App.3d 786, 236 Cal.Rptr. 660.) A petition for review was filed by appellant in the California Supreme Court. The California Supreme Court denied the petition for review on July 30, 1987 and, at the same time, directed that the opinion of the Court of Appeal not be published in the official reports. (Cal.Const., art. VI, § 4; Cal. Rules of Court, rule 976.)[8] This appeal followed and, by order dated April 18, 1988, this Court postponed decision as to its jurisdiction over this appeal to the hearing on the merits.

SUMMARY OF ARGUMENT

I. This Court has neither appeal jurisdiction nor, in the alternative, certiorari jurisdiction since appellant failed to seek review in a timely manner. Appellant should have appealed the 1984 decision of the California

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[8] At the time this matter was presented a *second* time to the California Supreme Court, the California Constitution had been amended regarding the effect of the California Supreme Court determining to hear a case by granting a Petition for Review. (Cal.Const. art. VI, § 6.) However, since January 1, 1964, the California Supreme Court has had the power to order an opinion of a Court of Appeal not be published in the official reports. As a general rule, neither a court nor a party may cite or rely on an opinion ordered not to be published in the official reports.

Supreme Court to this Court. He chose not to do so. Where a state appellate court in a final decision upholds the validity of state action against a federal constitutional attack and remands the case back to the trial court on state legal issues only, the decision is final under 28 United States Code section 1257(2) and 28 United States Code section 2103. If the aggrieved party waits until after trial on remand to seek review, the party has lost his right to obtain jurisdiction in this Court to decide federal constitutional issues which should have been and could have been raised when the state appellate court first rendered final judgment. (See *Budinich v. Becton Dickinson & Co.*, 100 L.Ed.2d 178, 185, 108 S.Ct. 1717, 1721 (1988).)

II. The California statutes challenged in this case are in full compliance with *Stanley v. Illinois*, 405 U.S. 645 (1972.) In a custody dispute between a parent and a non-parent, California law requires that an award to a non-parent requires two findings: (1) an award of custody to the parent would be detrimental to the child and (2) the award to the non-parent is in the best interests of the child. These findings were made by the California courts in this case and appellant was provided with both notice and an opportunity to be heard with respect to these findings. (See generally, *In re Tricia M.* (1977) 74 Cal.App.3d 125, 132-133, 141 Cal. Rptr. 554, *cert. den.* 435 U.S. 996 (1978); *In re Baby Girl M., supra*, 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 911.)

III. Appellant's substantive due process rights were not violated by the termination of his parental rights. In this case, as in *Quilloin v. Walcott*, 434 U.S. 246 (1978), the father had a hearing on his individualized interests in his biological child prior to the entry of the order of termination. A father must quickly seize the opportunity for fatherhood. If the father fails to grasp that opportunity, the federal constitution does not require "a state to listen to his opinion of where the child's best interests lie." (*Lehr v. Robertson*, 463 U.S. 248, 262 (1983).) In this case, the unwed father could have filed an action to establish filiation under section 7006, subdivision (c) as early as August 1, 1981. Such a proceeding would have stayed the

TROF proceeding and could have prevented the adoption. Finally, when considering the substantive due process rights of the unwed father, such consideration is simply part of a total due process assessment: the due process rights of the child, the unwed mother, and the adoptive parents must all be weighed against the custody claims of the unwed father. In evaluating these competing due process rights, the child's due process claims to continue her relationship with the only family she has known, the adoptive parents, must prevail. (*Smith v. O.F.F.E.R.*, 431 U.S. 816 (1977).) The adoptive family which has nurtured Katie has due process rights which corroborate Katie's due process rights to an undisturbed relationship with her legal and real parents, Mr. and Mrs. Moses.

IV. The use of the detriment/best interests of the child standard, even in the absence of a finding of parental unfitness, violates neither the procedural nor substantive due process nor equal protection rights of the unwed father. Appellant contends that it constitutes a denial of equal protection for California to terminate the parental rights of an unwed father without a finding of unfitness since presumed fathers and unwed mothers would not lose their rights absent such a finding. However, lack of fitness is not a federal constitutional requirement for a failure to award custody in these circumstances. In *Stanley v. Illinois* lack of fitness was an essential finding only because Illinois state law made it so. The unfitness/detriment standard which the appellant says should have been applied to him does not have its origin in, nor is it required by, federal constitutional law.

V. The distinction California makes between defined presumed fathers and other fathers is consistent with equal protection. Assuming appellant has lesser rights than presumed fathers, it is appellant rather than the state which is responsible. Appellant could have brought a section 7006, subdivision (c) proceeding to establish the father-child relationship. Insofar as section 7017 creates a distinction between unwed fathers (such as appellant) and other fathers, the policy behind the statute

is that a biological father who has evidenced no concern for his offspring must be differentiated from the biological father who has made manifest his concern. This distinction expedites society's interest in providing newborns with speedy placements in permanent family settings.

VI. Equal protection is not violated if a state conditions adoption of a newborn on obtaining an unwed mother's consent without requiring such consent from an unwed father as well. Unwed fathers and unwed mothers are not similarly situated. The mother bears the child but "the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested." (*Caban v. Mohammed*, 441 U.S. at 398-399 (1978) (Stewart J., dissenting.) The appellant's implicit argument that anything less than absolute gender neutrality in California's adoption and termination laws violates equal protection is in conflict with the decisions of this Court from *Quilloin* to *Lehr*. The gender-based distinction set forth in section 7017 meets an important governmental objective – assuring the timely permanent placement of the illegitimate child through adoption. Judging this classification only by the test of gender neutrality unnecessarily subordinates the rights of the newborn to a placement limbo since even the equivocal, reluctant or indifferent unwed father would thereby have a veto power over adoption and thereby be in a position to jeopardize the viability of the adoption process. Eight states besides California have provided, in their version of the Uniform Parentage Act, that the unwed mother but not the unwed father should have exclusive veto over adoption. The well-considered judgment of California and these states in this regard should be given deference by this Court in view of the historic position of our federalism that family law is a matter for the states and the state courts.

JURISDICTIONAL ARGUMENT

I. This Court Lacks Jurisdiction Since Appellant Failed to File A Timely Notice of Appeal From the Final Decision of the California Supreme Court

Appellant argues this Court has appeal jurisdiction or, in the alternative, certiorari jurisdiction because (1) the California courts determined that the California statutes were not violative of the federal Constitution and that the federal constitutional rights of appellant were not violated and (2) the 1984 decision of the California Supreme Court was not a final judgment and therefore this Court may now consider the federal constitutional issues. (Brief for Appellant pp. 5-6.) Appellant is mistaken. The 1984 decision of the California Supreme Court was a final judgment from which appellant was required to seek review of the federal constitutional issues in this Court.[9]

There is no dispute that the federal constitutional questions raised in this appeal were raised and considered in 1984 by the California Supreme Court in reaching its decision. (*In re Baby Girl M., supra,* 37 Cal.3d 65, 73-75.) *See also: Charleston Federal Savings & Loan Ass'n. v. Alderson,* 324 U.S. 182, 185-186; *In re Baby Girl M., supra,* 191 Cal. App. 3d 786-791, fn.2.) There is also no question that *at that time* this Court had jurisdiction to review that decision. (*Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).) This case was ripe for review since the California Supreme Court had held that section 7017 permitted the parental rights of an unwed father to be terminated upon a showing that an award of custody to the unwed father would be detrimental to the child and that an award

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[9] There is no question that there is a final judgment at this time terminating the rights of appellent as a result of the second trial and appeal through the California courts which affirmed the judgment of the trial court. However, since appellant failed to timely seek review in this Court, this appeal of the final judgment involves only matters of state law.

of custody to a nonparent would be in the best interest of the child. In reaching its decision, the California Supreme Court concluded that (1) section 7017 was constitutional under federal law and (2) that a termination under section 7017 would not violate any federal constitutional rights of the appellant. The federal constitutional issues had been raised and finally decided against appellant. The 1984 decision of the California Supreme Court became final on November 21, 1984, 30 days after filing of the decision. (Cal. Rules of Court, Rule 24(a).) Appellant sought no review. However, *now* recognizing this jurisdictional defect, appellant seeks to avoid this bar by contending that the 1984 decision of the California Supreme Court was not a final judgment subject to appeal jurisdiction since the case was remanded to the trial court for further proceedings on state law. This contention is incorrect.

The failure of a party to file a notice of appeal within the statutory time limit prescribed by Congress is a jurisdictional defect. (*Territo v. United States,* 358 U.S. 279 (1959); *Ward v. Winstead,* 400 U.S. 1019 (1971).) An appeal of a judgment of a state court must be taken within 90 days of the entry of the judgment or order in the state court. (28 U.S.C., § 2101(c).) There are no statutory exceptions to this time limit requirement. Appellee contends that under both the congressional statutes prescribing the jurisdiction of this Court and the prior decisions of this Court, the 1984 decision was a final decision from which appellant was required to seek review. The filing of an appeal on October 28, 1987, some *four years after* the 1984 decision, is outside the statutory 90-day time period and, as a result, this Court lacks jurisdiction.

The limitations on the appellate jurisdiction of this Court were exhaustively discussed in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469. In *Cox Broadcasting,* the Georgia Supreme Court had held that a criminal statute making it unlawful to publish the name of a rape victim was constitutional but did not give a civil remedy to those injured by its violation. The Georgia Supreme Court

held that the complaint stated a cause of action for invasion of privacy under common law which was not precluded as a matter of law by the First Amendment. The Georgia Supreme Court remanded the case to the trial court. However, the decision of the Georgia Supreme Court was appealed to this Court. The jurisdiction of this Court to hear the case was challenged on two grounds: (1) whether the constitutional validity of the state statute had been "drawn into question" and (2) whether the decision of the Georgia Supreme Court from which the appeal has been taken was a "[f]inal judgment or decree." (28 U.S.C., § 1257(2).) Insofar as pertinent to this case, Justice White described at least four categories of cases where in the context of the finality provision an appeal could be heard. (*Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469, 477-478.) This case comes within the principle behind these categories. This is a case in which further proceedings were to occur in a state trial court but where the federal issues had been conclusively decided and the "further proceedings cannot remove or otherwise affect" these federal issues. (*New York v. Cathedral Academy,* 434 U.S. 125, 128, fn. 4 (1977).) The case was remanded solely on a state issue of statutory interpretation. Under such circumstances the principles enunciated in *Cox Broadcasting* apply and the 1984 decision was a final judgment. Most recently, this Court, in an opinion by Justice Stevens, concluded that the decision of the Mississippi Supreme Court, which held that federal law did not preempt a state regulatory agency from exercising its jurisdiction and remanded the case back to the state regulatory agency for further proceedings, was a final decision by the Mississippi Supreme Court on the "critical federal question . . . [and] is therefore ripe for review." (*Mississippi Power & Light Company v. Mississippi,* 108 S.Ct. 2428, 2438, fn. 11 (1988).)

The justifications for the finality doctrine – "efficiency, judicial restraint, and federalism" – are served by concluding that the attempt of appellant to review the federal questions decided in the 1984 decision by appealing from the 1987 decision is ineffective. (*Dickinson v.*

Petroleum Conversion Corp., 338 U.S. 507 (1950).) This Court should be particularly sensitive to the impact of "delayed justice" in child custody or adoption cases.

There is absolutely no legitimate reason given by appellant for his failure to appeal the 1984 decision to this Court. Appellant chose to play a brand of "Russian Roulette" – that was his choice, his right and his risk. Neither the Adoptions Agency, Katie or the proposed adoptive parents had any right to seek review in this Court of the 1984 decision since they were aggrieved only on the state law issues, not on the federal constitutional issues. (See 28 U.S.C., § 1257(2) and 28 U.S.C., § 2103.) It is these parties who specifically suffer from the unexcused failure of appellant to pursue his appeal rights in a timely manner. Like his failure to seize timely the opportunity to seek custody of Katie, appellant failed to seize the opportunity to appeal the federal constitutional issues to this Court in a timely fashion.

A determination by this Court that appellant should have pursued his appeal in 1984 would mirror the concern expressed by this Court that extended uncertainty in state custody decisions is "detrimental to a child's development." (*Lehman v. Lycoming County Children's Services,* 458 U.S. 501, 513 (1982).) This Court has recognized that it should seek a practical approach to preserve "operational consistency and predictability in the overall application" of the finality rule for purposes of appeal. (See e.g., *Budinich v. Becton Dickinson & Co.,* 100 L.Ed.2d 178, 185, 108 S.Ct. 1717, 1721 (1988) (Scalia, J.).) Appellant should not be rewarded for his waiting game any more than he should be rewarded for his indecisiveness in 1981. Review of the 1984 decision would not have offended the objection to piecemeal review or been harmful to the trial process. (*North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 163 (1973).[10]

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[10] This court has recognized the "exceptional need for finality in child-custody disputes." (*Lehman v. Lycoming County Children's Service, supra,* 458 U.S. 502, 512.)

A judgment is either final for purposes of invoking the jurisdiction of this Court or it is not. If the 1984 decision was final then this appeal is too late. This Court has recognized that "[c]ourts and litigants are best served by the 'bright-line rule' which clearly establishes the time of appealability where it has jurisdictional consequences." (*Budinich v. Becton Dickinson & Co., supra,* 108 S.Ct. 1717, 1722 (Scalia, J.).) The "bright-line rule" in this type of case should be as follows: where the "final" decision of a state appellate court in a child custody or adoption case upholds the validity of a state statute or procedure against a federal constitutional challenge and remands the case back to the trial court on state law issues, the decision is final for purposes of appeal or certiorari, and the aggrieved party must seek timely review from that decision in order for this Court to have jurisdiction. If the aggrieved party waits until after trial on remand to seek review, this Court lacks jurisdiction to hear and decide any federal constitutional issues which could have been raised and determined in the earlier appeal. Appellant is on the wrong side of the "bright-line" and his appeal should be dismissed.

II. The California Statutes are in Full Compliance With the Requirements of *Stanley v. Illinois* and Provide An Unwed Father Ample Opportunity to Develop and Establish A Relationship With His Child

A. Uniform Parentage Act: California Version.

It has been long established in California that the consent of the parents of a child lies at the foundation of proceedings for adoption. (§ 224; *Adoption of McDonald* (1954) 43 Cal.2d 447, 452-453, 274 P.2d 860.) The purpose of adoption statutes is the promotion of the expeditious placement of children in a permanent home where there is continuity of care with nurturing parents. Traditionally, the statutes of California distinguished between a legitimate child and an illegitimate child as to the right to custody and the need for parental consent in adoption proceedings. Thus, in the case of an illegitimate child,

only the consent of the natural mother was required by statute. (See, *Adoption of Irby* (1964) 226 Cal.App.2d 238, 241-242, 37 Cal.Rptr. 879.) However, as a result of decisions of this Court, questions were raised regarding the validity of statutes permitting the adoption of an illegitimate child without some form of notice to the natural father of the illegitimate child. (See e.g., *Stanley v. Illinois,* 405 U.S. 645 (1972); *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan,* 405 U.S. 1051 (1972); *Vanderlaan v. Vanderlaan,* 405 U.S. 1051 (1972).)

In part because of the *Stanley* decision, the California Legislature enacted the California version of the Uniform Parentage Act (hereinafter "the Act").[11] (§ 7000, et seq; Cal. Stats. 1975, ch. 1244, § 11.) The major purpose of the Act is to provide for substantive legal equality of children regardless of the marital status of their parents. In place of the previous distinction between "legitimate" and "illegitimate" as legal labels for children based upon the marital status of the child's parents, the Act has substituted a legal concept called the "parent and child relationship." (§ 7002.) This relationship may exist between a

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[11] The California version differs in some respects from the provisions of the Uniform Parentage Act (UPA) as approved in 1973 by the National Conference of Commissioners of Uniform State Laws in 1973. (See Review of Selected 1975 California Legislation, 7 Pacific L.J. 412, 416-419 (1976).) The UPA has been enacted in 17 states: Alabama (Code 1975, §§ 26-17-1 to 26-17-21); California (West's Ann. Cal.Civ.Code, §§ 7000 to 7018); Colorado (C.R.S., 19-4-101 to 19-4-129); Delaware (13 Del.C. §§ 801 to 818); Hawaii (HRS §§ 584-1 to 584-26); Illinois (S.H.A. ch. 40, ¶¶ 2501 to 2526); Kansas (K.S.A. 38-1110 to 38-1129); Minnesota (M.S.A. §§ 257.51 to 257.74); Missouri (V.A.M.S. §§ 210.817 to 210.852); Montana (MCA 40-6-101 to 40-6-135); Nevada (NRS 126.011 to 126.391) New Jersey (N.J.S.A. 9:17-38 to 9:17-59); North Dakota (NDCC 14-17-01 to 14-17-26); Ohio (R.C. §§ 3111.01 to 3111.19); Rhode Island (Gen.Laws 1956, §§ 15-8-1 to 15-8-27); Washington (West's RCWA 26.26.010 to 26.26.905); and Wyoming (W.S.1977, §§ 14-2-101 to 14-2-120). (See 9B Uniform Laws Annotated, Master ed., Uniform Parentage Act, p. 287.)

child and his or her natural or adoptive parents and may be established under the Act. (§ 7003.) Thus, the Act abolishes the concept of illegitimacy and substitutes the concept of parentage as the basis for determining rights.

Insofar as applicable to this case, the basic provision of the Act governing TROF proceedings is found in section 7017 which, at all the relevant times in this case, provided as follows:

1. Where there is a "presumed natural father" (or a "legitimate" father pursuant to repealed § 230) and the mother "relinquishes or consents to or proposes to relinquish" the child for adoption, the presumed natural father has the right to notice of the adoption and his consent to it is required except as provided in section 224. (See, § 7017, subd. (a).)

2. Where, however, there is no "presumed natural father" (or no "legitimate" father pursuant to repealed § 230) and the conditions of 1 above are met, a TROF proceeding must be filed to terminate the rights of the natural father. If a natural father fails to appear, or does appear but fails "to claim custodial rights," the court *shall* terminate his parental rights, and order that only the consent of the mother shall be required for the child's adoption. This is true unless the court finds the man is a presumed natural father under section 7004, subdivision (a), in which case the court must order that the consent of the natural father is required for adoption. (§ 7017, subd. (d).) If a natural father appears and claims custody, the court shall proceed to determine parentage of and custodial rights to the child.[12]

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[12] Appellant *misstates* the law applicable to this case. Appellant references section 7017, subdivision (d)(2) on pages 3, 5, 8, 11, 13, 18, 26, 31 and 33 of the Brief for Appellant as the primary statutory provision involved in this case. However, there was *no* subdivision (d)(2) until it was enacted by the Legislature in 1986. (Cal. Stats. 1986, ch. 1370, § 2.) (S.A. 4-8.) These amendments did not take effect until January 1, 1987. The appropriate reference is to section 7017,

(Continued on following page)

The Act provides that notice of the TROF proceeding must be given to all possible natural fathers. (§ 7017, subd. (f).) The hearing in a TROF proceeding is closed and, other than the final judgment, the records of the TROF proceeding are confidential. (§ 7014.)

B. California Version of the Uniform Parentage Act: California Judicial Decisions

In determining the rights of unwed fathers, the California version of the Act distinguishes between a "presumed father" and one who is merely a "natural father." As previously noted, a "presumed father" is one who generally has or has attempted to marry the mother of the child or who has received the child into his home, and openly held out the child as his natural child. (§ 7004). The consent of a presumed father is essential to an adoption. (§ 7017, subd. (d).)

A TROF proceeding is ancillary to the adoption process. (*In re Baby Girl M., supra*, 37 Cal.3d 65, 76; § 7017.) The procedures established by the Act meet the constitutional procedural requirements of notice and opportunity to be heard. (*In re Tricia M.*, (1977), 74 Cal.App.3d 125, 132-133.) If a natural father appears and claims custody, the trial court proceeds to determine parentage and custodial rights in whatever order the trial court deems proper. Thus the trial court has discretion to consider custody *before* reaching an ultimate conclusion of parentage. For example, an unwed father worthy of and desiring custody may be blocked in his efforts to obtain custody because the mother refuses to permit him the opportunity to have the child. But the trial court may, in a proper case, grant him custody, allow him to complete the conduct necessary under section 7004, subdivision

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subdivision (d). (Cal. Stats. 1979, ch. 752, § 3.) (S.A. 1-4.) It is of interest to note that the 1986 amendment establishes the best interests of the child standard used by the trial judge in the 1981 trial.

(a)(4) to establish himself as a presumed father, and then make the appropriate order. On the other hand, the unwed father who has shown no previous interest in providing a family atmosphere for his child should not be allowed to withhold consent and block a speedy adoption. This would be in the child's best interests unless he can show his action will now result in a custodial arrangement serving the best interests of the child. (*In re Tricia M., supra,* 74 Cal.App.3d 125, 133-134.)

Prior to 1969, California adhered to the principle that a trial court must award physical custody of a minor to a parent, if fit to exercise custody, as against a stranger. This principle rested on a theory that the right of a parent in his child was similar to that of a property owner in his chattel. (*In re Campbell* (1900) 130 Cal. 380, 382, 62 P. 613.) In 1969, the California Legislature enacted the Family Law Act of 1969 (§ 4000, et seq.) which included section 4600. The Family Law Act eliminated the standard of unfitness in custody proceedings between a parent and non-parent and created a new standard which required a court to make a finding that an award of custody of a child to a parent would be "detrimental to the child" and that an award of custody to a nonparent was required to serve the best interests of the child before custody could be awarded to a non-parent. (*In re B.G.* (1974) 11 Cal.3d 679, 698-699 114 Cal.Rptr. 444, 457-458, 523 P.2d 244, 257-258.) This new standard was determined to apply to the custody issue in a TROF proceeding. (*In re Baby Girl M., supra,* 37 Cal.3d 65.)

The determination that an award of custody to a parent would be detrimental to a child is not the same as a finding of unfitness that would permit the state to intervene and remove a child from a parent or family who has custody of a child. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 795, fn. 7, 218 Cal.Rptr. 39, 705 P.2d 362.) The California statutes as written and as construed by the California courts provide a natural father with both notice and the opportunity to be heard *and* the

opportunity to develop and establish a parent-child relationship.[13]

III. Appellant's Substantive Due Process Rights Were Not Violated By the Termination of His Parental Rights

In this case, as in *Quilloin v. Walcott,* 434 U.S. 246 (1977), insofar as the unwed father has due process arguments, those arguments are substantive rather than procedural in nature. As in *Quilloin,* the father here received notice of the TROF proceeding. Again as in *Quilloin,* he had a hearing on "his individualized interests in his child, prior to the entry of the order of . . . adoption." (Id. at p. 253.) Although *Stanley* is cited throughout appellant's brief, it is not relevant to this proceeding. *Stanley* has had great influence with respect to the procedural due process rights of the natural father, rights which were granted to appellant under the California statutory scheme. The requirements of procedural due process, as set forth in *Stanley,* have been satisfied in this case.[14]

Appellant contends that he has a protected liberty interest to raise his natural child. (Brief for Appellant, pp. 20-21.) Appellant concedes, on the authority of *Lehr v. Robertson,* 463 U.S. 248, 261-262 (1983), that a "full commitment to fatherhood" is necessary to confer substantive due process protection on the unwed father's interest in his biological child. Further, appellant contends that he has demonstrated a "full commitment" to the responsibilities of parenthood. (Brief for Appellant, p. 24.) The reasons that the substantive due process rights of the appellant were not violated are very similar to the

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[13] This Court is bound by the construction given a state statute by the highest court of the state. (*Guaranty Trust Co. v. Blodgett,* 287 U.S. 509, 512-513 (1933).)

[14] *Stanley,* of course, is also concerned with the substantive due process rights of the unwed father but again is not relevant in this case since it is concerned with a father who lived with and reared his children.

reasons set forth by this Court in *Quilloin v. Walcott, supra*, for rejecting identical contentions there. In *Quilloin*, as here, the "best interests of the child" standard was applied.[15] In *Quilloin*, as here, the child had never been in the father's custody. Justice Marshall for the Court in *Quilloin* set forth the reasons for rejecting the unwed father's substantive due process contentions:

> "But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child.'" (Id. at p. 255.)

In *Quilloin*, the Court gave full recognition "to a family unit already in existence." In this case, the family unit was and remains Katie and Mr. and Mrs. Moses. This is the only family that Katie has ever known. This case presents the question: Which family unit should be preserved? That unit which now exists – the relationship of Katie with the Moses family? Or, should a new relationship be established whose creation is fraught with emotional and psychological risks to Katie? (See J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* 3-8 (1979).)

Professor Laurence Tribe has made an analysis of *Quilloin* which is highly relevant to the facts of this case.

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[15] The California Supreme Court determined that as a matter of state law a detriment/best interests of the child standard applied to TROF proceedings. (*In re Baby Girl M., supra*, 37 Cal.3d 65, 69-70.)

His analysis emphasizes the desirability of preserving a "complete" if non-biological family relationship rather than risk its destruction by acceding to the claims of an exclusively biological relationship. (See Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) p. 1417, fn. 24.)

Unlike *Quilloin*, in this case, appellant did at one point after the newborn's birth, ask not for custody but for a disposition which would give him access to the child. This factor is diminished by the fact that, when first confronted with the fact of Katie's birth, he did not wish custody. Does the belated request for custody without more demonstrate a "full commitment" to parenthood sufficient to distinguish *Quilloin's* rejection of substantive due process claims in very similar circumstances? We think not.

Quilloin stands for the proposition that there is a difference between siring a child and nurturing a child. In *Stanley* where due process was held to require notice to the unwed father, the father in that case was one who had done far more than merely siring a child. He had been a participant in the rearing of the children. In *Caban v. Mohammed*, 441 U.S. 380 (1979), the unwed father had also nurtured the children.

Siring a child alone is not enough to give an unwed father a protected liberty interest. Neither is a bare request for custody enough. The father must seize the opportunity for fatherhood.

What constitutes such seizure of opportunity? *Lehr v. Robertson*, 463 U.S. 248 (1983), sheds some helpful light on this question. In *Lehr*, the mother married a man, not the father of her child, eight months after the birth of the child. When the child was over two years old, the married couple filed a petition to adopt the child which was granted. The child's father had, to that point, neither supported nor lived with the child nor did he file any notice of intent to claim paternity as provided for under New York law.

Later the father did file a petition seeking paternity and rights of visitation. The father's principal objection in *Lehr* was that the adoption was granted without notice to

him. The father, Jonathan Lehr, contended that the grant of the adoption petition without notice to him offended both equal protection and due process. The Court, per Justice Stevens, emphasized the importance of distinguishing between "the developed parent-child relationship that was implicated in *Stanley* and *Caban* and the potential relationship involved in *Quilloin* and this case." (*Id.* at p. 261.) This case, like *Quilloin* and *Lehr*, is also a case involving a potential relationship. The commitment to fatherhood of the natural fathers in *Stanley* and *Caban* had created for them an interest in continuing personal contact with their children, which entitled them to "substantial protection under the Due Process Clause." (*Id.* at p. 261.) Potential relationships are in a different due process category. As Justice Stevens put it: "But the mere existence of a biological link does not merit equivalent constitutional protection." (*Id.* at p. 261.)

Professor Homer Clark, one of the nation's leading scholars in the law of domestic relations, analyzes *Stanley* and *Lehr*, and concludes: " . . . that where the father has persistently and consistently supported and cared for the child, he must be given notice if his parental rights or rights to custody may be cut off." (See Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, p. 860, Student's edition, (2d ed. 1988).)

Professor Clark then goes on to describe the precise issues in this case:

> "But *Lehr* gives us no clues as to how much of a relationship is enough to entitle the father to veto an adoption or have notice of the adoption petition. The *Lehr* case also leaves unanswered the question of the father's rights respecting adoption placements of newborn children." (*Id.* at p. 861.)

Professor Clark recognizes the problem of the unwed father and the newborn. He nonetheless cites approvingly *Wells v. Children's Aid Society of Utah*, 681 P.2d 199 (Utah 1984), holding that a Utah termination of parental rights statute which required the unwed father to file an acknowledgment of paternity prior to the time the child

is released to an adoption agency did not offend substantive due process. In the *Wells* case, the father's complaint alleged that Children's Aid Society and (the unwed mother) "had fraudulently concealed the facts surrounding the infant's birth to deprive him of his parental rights." (*Id.* at p. 201.) It is, of course, the appellant's contention in this proceeding that the state and the unwed mother similarly acted together to deprive him of a parental relationship. (See Appellant's Jurisdictional Statement, p. 10.) This argument ignores the facts that appellant was advised of his legal alternatives during his first meeting with Ms. Gray; he had the opportunity to consult with friends and others after he first learned of Katie's birth; and he had the advice of legal counsel throughout these proceedings.[16] In *Wells*, the father had not acknowledged paternity as provided for in the Utah procedure until the day before the mother relinquished the child to Children's Aid. At the termination of parental rights proceeding, the Utah trial court held that the state termination of parental rights statute could not constitutionally be applied to him because he was "'denied a reasonable opportunity to file his acknowledgment of paternity prior to placement of the child by Children's Aid Society.'" (681 P.2d 199 at 202.) The trial court conceded that the unwed father "did not make a timely filing of his acknowledgment of paternity as required by sec. 78-30-4(3)(b)." (*Id.*) The Supreme Court of Utah reversed and held that its termination of parental rights statute was constitutional. The court reached this result even though it agreed that its statute must meet a stringent standard of review. (*Id.* at p. 205.) The strong state

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[16] It should be noted that appellant made no effort to determine if PAM was pregnant as a result of their sexual relationship. The birth of Katie was a surprise to him. To Justice Mosk, appellant might be a "casual inseminator". (*Michael U. v. Jamie B., supra*, 39 Cal.3d 787, 797 (Mosk, J. concurring.)

interest behind the Utah termination of parental rights statute was described as follows:

> "The state's strong interest in immediate and secure adoptions provides a sufficient justification for significant variations in the paternal rights of unwed fathers, who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth." (*Id.* at 203.)

The *Wells* court found its statute consistent with the constitutional standards of *Lehr*. *Lehr*, it will be recalled, spoke of the need for the father to grasp the opportunity for fatherhood. Biology offers the father that opportunity. But he must accept "some measure of responsibility for the child's future." (463 U.S. 248 at 262.) In *Lehr* the remedy open to the unwed father was described by the Court as follows:

> "The State of New York maintains a 'putative father registry.' A man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child." (463 U.S. 248 at 250-251.)

The father in *Lehr* failed to file in the putative father registry. If the father fails to grasp that opportunity, "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (463 U.S. 248 at 262.) In *Wells*, in *Lehr*, and in this proceeding, the unwed father did not grasp the earliest opportunity to assert fatherhood and a desire for custody. At his first meeting with the social worker in *Wells*, the unwed father was "equivocal, never indicating positively whether or not he desired to assert his parental rights." (681 P.2d 199 at 202.) Appellant is in a similar position here. The unwed father in *Wells* said on September 17, that he did not know whether he wanted the child; on September 23rd, he decided he wished to claim paternity. The father in this case was and is similarly equivocal. Even now he does not ask for custody nor did he at the child's birth. The reasons the opportunity of which *Lehr* speaks must be quickly grasped are described

in what Professor Clark quite correctly calls the "well-reasoned" decision in *Wells*. (*Clark, supra,* at p. 861.) The state interest in "speedily identifying those persons who will assume the parental role" over illegitimate newborns is very strong because "immediate and physical care" must be assured but the state must also facilitate "early and uninterrupted bonding of a child to its parents." (681 P.2d 199 at 203.) Appellee submits that exactly the same kind of considerations which promoted the Utah Supreme Court to conclude that its statute satisfied *Lehr* justify a conclusion that section 7017 is also valid and consistent with the standards of substantive due process.

The opportunity for fatherhood must be quickly grasped. Lest it be thought that this is too severe a doctrine as far as the rights of the unwed father are concerned, it is interesting to note that even the most ardent proponents of the rights of the unwed father recognized that there are other important considerations in the due process mix that must be heeded – the rights and best interests of the child. (See *Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson,* 45 Ohio State Law Journal 313 at 377 (1984).)

The French philosopher, Rousseau, said: "A father has no right to be a father if he cannot fulfill a father's duties." (Jean-Jacques Rousseau, *Confessions,* (Penguin ed. 1953).) When confronting the dilemma of protecting the due process rights of both the illegitimate child and the unwed father, the extent to which the father has effectively seized the opportunity to establish fatherhood which the state, in this case California, has provided must be examined.

Appellant *misstates* his rights under the Act when he argues his "inability to initiate a proceeding to establish his paternity and get custody or visitation." (Brief for Appellant p. 8.) In the case of an unwed father, such as appellant, the Act provides two methods for determining the father and child relationship: (1) by proof of one of the criteria which establishes the presumption of the relationship; or (2) by a legal action which results in a judicial determination of the existence or non-existence of

the relationship. (§ 7004.) At the time Katie was conceived and born and the TROF proceeding was commenced and pending section 7006 provided:

> "(c) *An action to determine the existence of the father and child relationship* with respect to a child who has no presumed father under section 7004 or whose presumed father is deceased *may be brought by* the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, *a man alleged or alleging himself to be the father,* or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. *The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final."* (Emphasis added)[17] (S.A. 10-12.)

In this case, appellant could have brought a proceeding under section 7006 to establish fatherhood as early as August 1, 1981, when he first learned of the birth of Katie. Bringing such a proceeding would have stayed the TROF proceeding. If this had been done, the adoptive placement would have been jeopardized and, if successful, the adoption itself would not have been possible. If the appellant had been successful in the filiation proceeding he would have been a "presumed father" under California law and would have had, as does the

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[17] The 1986 amendment to section 7006 provided that an action commenced under section 7006 was to be consolidated with an adoption proceeding under section 7017, subdivision (b) instead of suspending adoption proceedings, and provided that the alleged natural father's rights be determined pursuant to section 7017, subdivision (d). (Cal. Stats. 1986, ch. 1408.) (S.A. 12-14.) The 1987 amendment inserted, in the second sentence of subdivision (c), "if a proceeding has been filed under section 7017." (Cal. Stats. 1987, ch. 114.) However, the 1986 and 1987 amendments are not applicable to this case since the second trial was concluded in February 1985.

mother, a veto over an adoption. In short, the due process rights that appellant insists on here were in fact afforded and available to him by California and were lost not as a result of any state action but as a result of his own indecisiveness and inaction.

Finally, in analyzing the due process issues in this case, it is very important to make clear what this case is about. This case concerns the placement of a child whose unwed father was equivocal about her future and whose unwed mother was not. The unwed mother sought to place Katie with an identifiable adoptive couple, Mr. and Mrs. Moses. This family had been selected and found suitable for adoptive placement by a licensed state adoption agency. This case is *not* about the state taking a child away from a father on the basis of neglect when that father has had continuous or any custody of the child for purposes of placing the child in a foster care system. Appellant cites some articles by several legal writers as if those articles are applicable to this proceeding, (see Brief for Appellant, pp. 38-39), but these articles are about state intervention and neglect proceedings. Insofar as these articles relate to this case, the principle of preservation of the family, for which these writers argue, supports appellee rather than appellant.

Another issue that should be discussed in the context of this case is – how should the statement of the trial court judge that appellant was a "capable parent to his boys" (J.A. 7-8) be evaluated? In a *constitutional* sense, it is simply part of the due process evaluation: The due process rights of the child, reflected as they are in the best interests standard, are weighed against the custody claims of the father. It is important to understand what the term fitness means in the field of family law. It means that a person has the ability to promote the physical and psychological well-being of the child at the time of the custody dispute. From a practical vantage point, this means that the court has to weigh the child's present relationships and the effect any change will have on those relationships. (See generally, Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* (1979).) This is

precisely what the trial court in California did each time this difficult choice was presented. In each case, weighing these competing interests the trial court decided against the appellant.

Appellant does not even appear to recognize that the due process claims of the unwed father might conflict with the due process rights of the child. (See Brief for Appellant, pp. 21-22, fn. 6.) Indeed, this case implicates a number of rival due process claims: those of PAM, appellant, Katie and the Moses family.

In a recent comment (see Belliston, *The Putative Father's Due Process Rights to Notice and a Hearing*, 1986 Brigham Young L.Rev. 1081), the unwed mother's interest is described as follows:

> "The decision to give up (the child) for adoption is almost always a difficult one, made possible only by the mother's conviction that she is doing what is best for the child. For many unwed mothers, knowing that the child's father might successfully challenge the adoption could make her decision traumatic." (*Id.* at p. 1094.)

Indeed, it has been suggested that "mothers will keep their babies if there is any uncertainty surrounding immediate and final adoptive placement." In addition, if the mother retains custody under such circumstances, concern has been expressed that "the child will very likely be harmed." (*Id.* at p. 1094, fn. 47; also see *Sylander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1112 (1st Cir. 1978).)

The adoptive parents also have due process rights which merit consideration.[18] In *Smith v. O.F.F.E.R.* 431 U.S. 816, 843 (1977), which involved the issue of whether state procedures to remove foster children from foster parents complied with due process standards, the Court suggested that foster parents had some due process rights even though they were not the biological parents.

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[18] The adoptive placement by the Adoptions Agency was occurred on August 24, 1981. The San Diego County Superior Court entered an adoption decree on August 7, 1987.

Justice Brennan said for the Court: "A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family." (*Id.*)

In the *Smith* case, the Court made clear that the "liberty" interests of the foster parents were subordinate to the "liberty" interests of the natural parents: "In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." (*Id.* at p. 846.) This passage has a dual implication for this case. First, some "liberty" interest was recognized even for foster parents against the claims of natural parents who had had custody in the past. Second, if foster parents have a constitutionally protected "liberty" interest, the "liberty" interest, under the due process clause of the Fourteenth Amendment, of adoptive parents with legal custody must, by definition, be even stronger.

Substantive due process "bars certain arbitrary government actions regardless of the fairness of the proceedings used to implement them". (*Daniels v. Williams*, 474 U.S. 327, 337 (1986) [Stevens, J. concurring].) In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court charted the course of substantive due process doctrine insofar as it bore on protected family relationships. Thus, Justice Powell in the plurality opinion for the Court in *Moore* quoted approvingly from *Prince v. Massachusetts*, 321 U.S. 158 at 166 (1944) that "a host of cases" had "consistently acknowledged a 'private realm of family life which the state cannot enter.' " (*Id.*, at p. 499.) The origins of this doctrine lie in *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). Those cases, like *Stanley v. Illinois*, 405 U.S. 645 (1972), assume an established parent-child relationship. In this case, however, there is no established parent-child relationship between this appellant unwed father and Katie. The appellant unwed father contends that the state cut off his opportunity to develop that

relationship. In fact, appellant here had such an opportunity and failed to avail himself of it. But, as was developed earlier, there are other due process rights which must be considered. As far as Katie who is the center of this controversy is concerned, the parent-child relationship which is fundamental to her existence is her relationship with her adoptive parents, the Moses family.

In *Moore*, the Court held that a municipal ordinance which in effect limited occupancy of a dwelling unit to members of a nuclear family was a violation of substantive due process. *Moore* holds that the family unit that is protected under the due process clause extends beyond the nuclear biological family. This supports the position of the appellee and the adoptive parents in this case.

This case raises the question of identifying the family unit and the parental relationships which should be accorded due process protection. Should a "family" unit now be fabricated by the state to provide visitation rights for the appellant? Or should the long-standing family unit the state has created, the relationship between Katie and the Moses family, be preserved?

Professor Tribe has urged that the emphasis of the plurality in *Moore* "upon the blood relationship of the parties should not be treated as decisive." He writes: "The functions shaping and transmitting values, which the *Moore* plurality identified as justifying protection for the extended family, inhere in a wide variety of enduring relationships; government interference with any such relationship should be invalidated unless compellingly justified." (See Tribe, AMERICAN CONSTITUTIONAL LAW, p. 1420 (2d ed. 1988).)

This reasoning has direct application to this proceeding. The adoptive family which has nurtured this child has due process rights even though they are not blood relatives of that child; they are the child's legal and real parents. The family unit represented by the Moses family and Katie cannot be held hostage to the appellant's belated desire for a modified kind of paternity. The substantive due process claim of this unwed father can only be recognized by ignoring the substantive due process

claims of those who have willingly and unreservedly sought out the responsibilities of parenthood which even now, as this appellant candidly avows, he does not desire to fully assume. (Brief for Appellant, p. 22, fn. 6)

And what of the due process rights of the child? Although in cases such as this, it is the father's complaints which are before the court, "the most important interests to be considered are probably those of the child." (*Id.* at p. 1094.) Thus, the difficult task of resolving competing due process claims is presented. Corollary issues arise such as whether the child's interest should be accorded distinct due process protection and whether amidst these competing claims of adoptive parents and unwed father, the due process rights of the child should be given the greatest weight.

This Court has spoken of "the paramount interest in the welfare of children." (See *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).) *Lehr* also said at the same time "that the rights of the parents are a counterpart of the responsibilities they have assumed." (*Id.*)

Consideration of the due process interests of the child do not, of course, mean that the due process interests of the unwed father should not also be evaluated. The fundamental point is the child must be part of the total due process assessment when due process rights are considered: "But the state may consider the interests of the child – without reference to the prospective parents – in determining how much protection the father must have." (See 1986 B.Y.L.Rev. 1081 at 1094.) In this context, once the adoptive placement has been made – as in this case – the child's best interests are "probably served by leaving him in the adoptive home." (*Id.* at 1095; see Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* 36 (1979).)

Appellant argues that he has a constitutionally protected parental interest. Yet he does not seek parenthood; even now he concedes he "does not demand immediate custody." (Brief for Appellant, p. 22, fn. 6.) Appellant argues that he should in these circumstances have "a

right to further develop the relationship." (*Id.*) This contention is made with no awareness that this might have adverse consequences for a child who has for all her seven years known only her adoptive parents. At the same time appellant says this, he hints at future litigation suggesting that someday he may seek custody, i.e., "[i]f it is best for the child to be in someone else's custody, *at least for the present*." (*Id.*)

When due process rights collide, the rights of just one of the parties to that conflict cannot be considered *in vacuo*. In this situation, as in the foster parent situation in *Smith*, it must be recognized that the "claim to a constitutionally protected liberty interest raises complex and novel questions." (*Smith v. O.F.F.E.R., supra,* 431 U.S. 816, 847.)

The California trial court which was the fact-finder in this proceeding has shown an understandable reluctance to disrupt the only family this child has known, i.e., the adoptive family. Indeed, this concern for the child's stable and permanent placement explains why California requires the unwed father of the newborn to take one of several prescribed initial statutory steps to put himself in a "presumed father" category. It also helps to explain why California's statutory scheme, under section 7017, does not give the father a veto over adoption. The explanation offered by Justice Stevens for New York's registry requirement in *Lehr* serves quite well also to explain California's refusal to give the unwed father of the newborn an exclusive veto over adoption equivalent to the mother:

> "The New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees." (*Lehr v. Robertson*, 467 U.S. 248, 264.)

The mother has relinquished this child; an adoptive placement–now seven years in duration, the entire length of this child's life–is now long established. The father

took advantage of none of the statutory opportunities which California law affords–opportunities which if availed of would have given him in the first year of his child's life an absolute veto over the adoption. Analysis of competing due process considerations must yield but one result in these circumstances: The child's interest in stability must prevail.

IV. The Use of the Detriment/Best Interests of the Child Standard, Even in the Absence of a Finding of Parental Unfitness, Violates Neither the Procedural or Substantive Due Process or Equal Protection Rights of the Unwed Father

The best interests of the child standard has been the foundation of American child custody law since the nineteenth century. (Clark, *The Law of Domestic Relations in the United States*, section 19.6 (2d ed. 1988).) Appellant says the best interests of the child standard "is noble and high-minded . . . but the application is confusing, uncertain, and subject to contrary definition from case to case." (See Brief of Appellant, p. 38.) Is the best interests standard constitutionally imprecise?

The Supreme Judicial Court of Massachusetts, per Justice Kaplan, rejecting this contention, made the helpful observation about the best interests of the child standard that mathematical precision was not possible when defining a concept like best interests. (*Petition of New England Home for Little Wanderers*, 367 Mass. 631, 646, 328 N.E. 2d 854, 863 (1975).) How have the state courts reacted on the whole to these contentions of vagueness and imprecision with respect to the best interests of the child standard? Professor Clark responds to this question as follows:

> "Although it is extraordinary that constitutional principles should be so uncertain when applied to the most fundamental of human relationships, perhaps we can take some comfort from the large measure of agreement among courts that reasonable legislative attempts to define the circumstances in which parental rights may be terminated will not be held void for vagueness, pursuant to that vaguest of

all constitutional principles. The interests of both parents and children are best served by an informed and sensitive judiciary operating under statutes giving them workable standards." (Clark, *supra*, pp. 892-893.)

This Court has implicitly approved the validity of the best interests standard. *Santosky v. Kramer,* 455 U.S. 745 (1982), involved a New York termination of parental rights proceeding on the basis of neglect; the best interests of the child standard was used. However, the standard of proof in the proceeding was the fair preponderance of the evidence. The Court, per Justice Blackmun, said the clear and convincing standard of proof should have been used.

In short, the Court could have held in *Santosky* that the terms neglect and bests interests of the child are constitutionally vague. To have done so would have destroyed the entire legal fabric of family law in the United States. Wisely, the Court chose not to take such a course. Instead, the Court chose to cope with any problem of imprecision in the quasi-criminal New York neglect proceeding by requiring a stricter standard of proof, i.e., the clear and convincing standard of proof.

Appellant contends that a fundamental issue in this proceeding is whether it constitutes a denial of equal protection for California to terminate the parental rights of an unwed father without a finding of unfitness since presumed fathers and unwed mothers would not lose their rights absent such a finding. (See Brief for Appellant, p. i.) The necessary implication of this contention is that the use of the detriment/best interests of the child standard in this proceeding without a specific judicial finding of unfitness is constitutionally improper. An identical contention was made in similar circumstances before the District of Columbia Court of Appeals on substantive due process grounds. In *Matter of P.G.*, 452 A.2d 1183 (D.C.App. 1982), an unwed father contended that the District of Columbia adoption law violated "due process by permitting the termination of parental rights over the objection of a natural parent, without a finding

that the natural parent is unfit to raise the child." In *Matter of P.G.*, the unwed father grounded his contention of a substantive due process theory based on *Stanley v. Illinois*, 405 U.S. 645 (1972). Judge Newman, speaking for the District of Columbia Court of Appeals, rejected the appellant unwed father's contention: "[A]ppellant's claim is not founded on procedural, but substantive due process–a challenge to the best interest standard. Contrary to appellant's suggestion, *Stanley* does not stand for the proposition that the father of an illegitimate child has a constitutional right to block an adoption unless he is unfit. Lack of fitness was an essential finding in that case only because *under state law*, that was the only basis for granting an adoption without parental consent even when the parents were married." (*Id.* at p. 1184.) In addition, the District of Columbia Court of Appeals in *Matter of P.G.* read *Quilloin* as finding "that the best interest standard satisfied the due process rights of the nonconsenting parent, *at least where the effect is simply to recognize an existing family unit.*" (*Id.* at p. 1184.) Under this interpretation, *Quilloin* holds that the best interests standard should prevail where the child has already been integrated for some time, as in the instant proceeding, into the adoptive family. This is not to say that *Quilloin* holds that the best interests standard will "always suffice" in other situations. (*Id.* at p. 1185.)

In this case, as in the factual context in *Stanley*, the alleged necessity for a finding of unfitness is based on a state law claim rather than on federal constitutional standards. In fact, in this proceeding this contention is an overstatement. In *Baby Girl M., supra*, 37 Cal.3d 65 at 67-68, Justice Sonenshine, speaking for the Supreme Court of California, stated the issue as follows: "We are asked to determine whether the trial court erred in terminating a natural father's parental right by considering only the best interests of the child without first considering whether an award of custody to him would be detrimental to the child. We conclude section 4600 is applicable to all section 7017, subdivision (d) proceedings and reverse the judgment." Thus, it is detriment which

the California court spoke of rather than unfitness. As the result on remand in the California courts in this case illustrates, detriment is a different standard from unfitness; detriment is evaluated from the point of view of the child. Undoubtedly for the trial court, which is so close to the difficult human realities of the real life situation, the detriment standard becomes another rubric for the necessary and inevitable focus on the best interests of the child. This, of course, is why the trial court on remand rejected the appellant's claims.

Justice Mosk, who dissented in *Baby Girl M.*, devotes much of his dissent to a statutory analysis in support of his conclusion that the "application of the detriment standard to a natural father gives him the identical veto powers over an adoption and the same custodial rights as are granted to a presumed father under section 7017." (*Id.* at p. 78.) In short, neither the majority nor the dissenting opinions of the California Supreme Court in *Baby Girl M.* proceeded on a theory that detriment, much less proof of unfitness of the unwed father, were constitutionally required under the Fourteenth Amendment.

After analyzing the relevant California legislation as it stood at that time, Justice Mosk concluded: "There is no persuasive reason why the best interest of the child should not be a sufficient standard to test the custodial rights of a man who has had no relationship of any nature with a child other than biological." (*Id.* at p. 77.) California has since made the best interests of the child standard the exclusive legislative standard. But the unfitness-detriment standard which the appellant says should have been applied to him as a precondition to loss of custody is based on an analysis of California statutes. This Court has never required, as a matter of federal constitutional law, that such a standard be applied to the unwed father in this context in preference to the best interests of the child standard. This is especially true where, as here, preservation of a long term existing family unit with which the adoptive child is fully integrated exists and where the unwed father has failed to seize the

statutory opportunities for fatherhood. In such circumstances, he should not be given the intrusive and disruptive rights for which he now contends. *Santosky, Stanley* and *Quilloin* fully support the use and constitutional validity of the best interests of the child standard in circumstances like these.

V. The Distinction California Makes Between Defined Presumed Fathers and Other Fathers is Consistent With Equal Protection

Appellant complains that under California law presumed fathers have the same custody and veto rights over adoption as unwed mothers. (See § 7017, subd. (d); J.S. 7?a.) Unlike unwed fathers, presumed fathers and unwed mothers may have their parental rights terminated "only for incapacity to parent, neglect, or abandonment on specified grounds with particular proof." (See Brief for Appellant, p. 33.) Appellant then, in a gross over-statement, continues: "The legislative presumption, upheld by California courts, is that many of the non-presumed fathers, natural fathers, do not care about their children." (See Appellant's Brief, p. 33.)

The point these contentions overlook is that it was not the state but the appellant himself who is responsible for the status of which he complains. Appellant had it within his power to become a presumed father. If he had received custody from the proceedings in this case, he would have been a presumed father. He could have filed an action to establish the parent-child relationship to use the language of the California version of the Uniform Parentage Act. Moreover, the appellant never sought personal custody.

A corollary of appellant's contention that as an unwed father he is being treated differently than presumed fathers is that he is being treated differently than a married father and is therefore denied equal protection. In *Parham v. Hughes*, 441 U.S. 347 (1979), this Court was faced with the question of whether a Georgia statute which denied the unmarried father of an illegitimate child the right to sue for the wrongful death of the child

violated both the due process and equal protection clauses of the Fourteenth Amendment. Under Georgia law, unmarried mothers as well as legally recognized mothers of the child and legal fathers (this term includes an unmarried father who legitimized the child) could recover for wrongful death of the child. Here as in *Parham* the unwed father claimed he was placed in a special discriminated against status. Justice Stewart for the plurality in *Parham* rejected this contention.

In the case before this court, appellant also had an opportunity to bring a filiation proceeding at any time prior to February 26, 1982 the date of judgment in the TROF proceeding. Such an action by the appellant would have stayed the TROF proceeding. (§ 7006.) Failure to establish fatherhood in this proceeding like failure to legitimate in *Parham* led to adverse consequences for the unwed father; but in each case the state had created a vehicle to put that father on an equal footing. What was the reason for the differential treatment of the unwed father in each case? The State of Georgia in *Parham* wished to make sure that only legitimate fathers could make claims on behalf of the deceased child, thus minimizing multiple lawsuits and thus avoiding fraudulent claims.

In this case, California asks a father to establish filiation in order to show that he intends to assume the full panoply of parental responsibilities. The policy behind the statute under review, section 7017, is that a biological father who has evidenced no concern for his offspring must be differentiated from the biological father who has made manifest his concern. The reason for this distinction is not only the administrative concern to protect the viability of the adoption process. The administrative convenience of government officials may not itself justify the distinction of which appellant complains. (*Frontiero v. Richardson*, 441 U.S. 667 (1973).) But the more substantive issue is the best interests of the child. This concern reflects the belief society has that the newborn's best interest is served by the speedy and smooth transition to a permanent family. The hypothetical interest in

his offspring by an absent biological father can not hold this entire process hostage.

VI. Equal Protection Is Not Violated If A State Conditions Adoption Of A Newborn On Obtaining a Natural Mother's Consent Without Requiring Such Consent From the Natural Father As Well

Appellant contends that the mother here had "exactly the same kind of veto power" which was invalidated in *Caban v. Mohammed* 441 U.S. 380 (1979). (Brief for Appellant, p. 31) Reference is then made to the holding in *Caban* that the statute under review there, section 111 of the New York Domestic Relations Law (McKinney 1977), was an example of "'overbroad generalizations' in gender-based classifications." (*Id.* at p. 394.) Although it is true the unwed mother's consent to adoption was necessary under California law and the unwed father's consent was not, the situations are not exact. Nor did the *Caban* court hold that "gender-based classifications" between unwed mothers and unwed fathers were invariably overbroad and invalid.

In fact, Justice Powell in *Caban* specifically mentioned problems that might ensue from a constitutional requirement that the power to consent to adoptions be identical for unwed fathers and unwed mothers. Such problems include difficulties associated with locating and identifying unwed fathers at birth. The Court then – significantly for this proceeding – said, "[T]hese difficulties need not persist past infancy." (*Id.* at p. 392.) But the Court recognized the justifiable differences that existed, and still exist, between the legal rights of the unwed father and the unwed mother if the rights of an infant or newborn are involved.

Justice Powell specifically emphasized in *Caban* that its facts dealt with an older child whose father had come forward to participate in its rearing. On the question of whether constitutionally an unmarried father's consent to adoption must be obtained from him as it must be from the mother in the case of a newborn, Justice Powell

specifically set aside resolution of the issue (*Id.* at p. 392, fn. 11.)

This case presents the issue that *Caban* left open for resolution: Whether equal protection was violated if a state conditioned adoption on obtaining an unwed mother's consent without requiring such consent from the unwed father as well. In dissent in *Caban*, Justice Stevens addressed the issue as it affects newborns. Cautioning against a "merely reflexive rejection of gender-based distinctions" (*Id.* at p. 403), Justice Stevens pointed out most adoptions involved newborns or very young children. Therefore, it was important to make a candid appraisal of the differences between unwed mothers and unwed fathers in this situation. The mother bears the child; indeed, she has a "constitutional right to decide whether to bear it or not." (*Id.* at p. 404.) These and other differences, Justice Stevens reasoned, made it probable that "the mother, and not the father or both parents, will have custody of the newborn infant." (*Id.* at p. 405.)

The fact that the newborn is found with its mother at birth make it, Justice Stevens concluded, "virtually inevitable that from conception through infancy the mother will be consistently faced with decisions about how best to care for the child." (*Id.* at p. 406.) The father in this case had vacillated. At first, he did not want custody. The mother's first information on the placement desires of the father was that he wished the child to be placed with another family. (See this Brief, pp. 2-3.) From the child's birth the mother was confronted with the question: "[h]ow best to care for the child"? (*Id.* at p. 406.) Justice Stevens concluded:

> "[A]s a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process." (*Id.* at 406-407.)

In *Caban*, Justice Stevens thought the gender-based distinction was clearly "justified in those cases in which the rule (lodging consent to adoption exclusively with the

natural mother) has its most frequent application – cases involving newborn infants and very young children in custody of their natural mothers." (*Id.* at p. 410.) Justice Stevens argued that a state statute giving only the mother a veto power over adoption in such circumstances should not be rendered invalid.

Justice Stevens declared that where a "subclass is small and its disadvantage insignificant" in comparison with the benefits of the rule, a gender-based distinction alone does not justify a conclusion of equal protection violation. (*Id.* at p. 410.) Appellee sets forth Justice Stevens' analysis in some detail because his dissent is predicated on what he believed was the *Caban* court's "undisputed assumption," (*Id.* at 410), that giving the mother of the newborn an exclusive veto over adoption is not only constitutionally valid but has many reasons to recommend it, *i.e.*, giving the unwed mother maximum flexibility in deciding how to best care for the child as well as giving a loving father an incentive to marry thereby legitimating the child. In such circumstances, under New York law (as would be the case under the law of California in this proceeding), the father would be assured "the right to consent to any adoption." (*Id.* at p. 407, fn. 14.)

In short, if *Caban* is closely analyzed, the majority of the court specifically declined to pass on whether a statute giving the unwed mother but not the unwed father an exclusive right to consent to adoption violated the equal protection clause *in the case of newborns*. (Emphasis supplied.) Indeed, Justice Stewart in dissent assumes that the statutory difference in treatment between the unwed mother and the unwed father in the case of newborns (in terms of consent to adoption) was the paradigm justification for a gender-based distinction:

> "With respect to a large group of adoptions – those of newborn children and infants – unwed mothers and unwed fathers are simply not similarly situated, as my Brother Stevens has demonstrated. Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears

the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested. See H. Clark Law of Domestic Relations, 176-177 (1968), H. Krause, Illegitimacy, Law and Social Policy, 29-39 (1971). This custodial preference has carried with it a correlative power in the mother to place her child for adoption or not to do so." (*Id.* at pp. 398-399.)

Justice Stevens in dissent in *Caban* protested the invalidation of a New York law which gave a veto power over adoption to the unwed mother but not to the unwed father. He did not think that invalidating the entire classification to cope with the isolated case of the father of an older child who had participated in its rearing was justified:

"The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule. Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles. We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases. (*Id.* at pp. 411-412.)

Several conclusions emerge from this analysis. First, *Caban* is consistent with *Quilloin* in that the focus of each case is on the quality of the unwed father's commitment to and actual responsibility for the welfare of the child and the existence of an existing mutual relationship between the unwed father and the child. Second, *Caban* simply does not support a conclusion that terminating the parental rights of the unwed father of a newborn violates equal protection because the mother's rights could not be similarly cut off. Third, a reading of Justice Stevens' dissent is persuasive that the "undisputed assumption" of the *Caban* court was that a gender-based distinction in the case of newborns is justified.

Similar gender-based legislation in other states has been held after careful analysis to meet constitutional standards. In *In re Interest of T.E.T.*, 603 S.W.2d 793 (Tex. 1980), *cert. den.* 450 U.S. 1025 (1981), the Texas Supreme

Court upheld the requirement of the Texas Family Code that the biological father of the illegitimate child, but not the mother, had to establish parental status in a legitimation proceeding. The Texas Supreme Court relying on *Caban, supra,* held that its gender-based statute met a "valid objective in requiring the biological father to establish his 'status' as a parent": "Otherwise, we would recognize a sperm donor, a rapist, a 'hit and run' lover, an adulterer and the like in the same legal status as a father who had accepted the legal and moral commitment to his family. While recognizing this valid distinction, Texas law offers the biological father of an illegitimate child the opportunity to prove in which category he belongs." (*Id.*, at p. 797.) The Texas Supreme Court held that equal protection was not violated if the state chose in the best interests of illegitimate children to distinguish among fathers in order to identify those who had sought out the opportunity to avow a "legal and moral commitment" to parenthood.

However, this was not the only interest served by the gender-based distinction in the Texas Family Code. This distinction also served the state's interest in protecting illegitimate children: "[The mother] can choose to abort the child or she may carry it full term. The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute is substantually related to the achievement of that interest." (*Id.*) Appellee submits that the two state interests asserted by the Texas Supreme Court to be important state objectives which justify the similar gender-based distinction of the Texas Family Code – (1) the state's need to assure itself that the father has a legal and moral commitment to fatherhood and (2) the state's concern that awarding an indiscriminate veto to the father would prompt the mother to make choices adverse to the child which she would not otherwise make – are directly relevant to the question of the validity of section 7017 in this

proceeding and similarly justify a conclusion that section 7017 is also valid.

Lehr v. Robertson, 463 U.S. 248, 266-268 (1983), held that where an unwed father has never established a substantial relationship with his daughter, the New York statutes at issue in *Lehr* did not operate to deny Mr. Lehr equal protection. The State of New York maintains a putative father registry which allows the father of a child born out of wedlock – as was the case in *Lehr* – to file a notice of intent to claim paternity. Under such circumstances, the person filing such a notice of intent is entitled to receive notice of any proceeding to adopt the illegitimate child.

Jonathan Lehr, the unwed father, although knowing of the birth of the child (as did appellant here) failed to avail himself of the opportunity to claim paternity by filing a notice of intent in the registry. Lehr did more in the way of showing some of the concerns of fatherhood than appellant here. For example, he offered "to provide financial assistance and to set up a trust fund for [the child]." (*Id.* at p. 269.) Nonetheless, the Court held in *Lehr* that failure to strictly comply with the registry law cut off his notice rights. Justice Stevens, speaking for the Court, explained why the failure to avail himself of the New York law did not deprive the father of equal protection. This was so even though if the child had been living with him, or if the mother's consent was involved, there would have been no requirement to file with the registry: "If one parent has an established custodial relationship with the child and the other parent has either abandoned, or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights." (*Id.* at pp. 267-268.) In reaching this conclusion, the Court stated: "Those [registry] procedures are designed to promote the best interests of the child, to protect the rights of interested parties, and ensure promptness and finality." (*Id.* at p. 266.) The governmental objectives behind section 7017 are, as was pointed out in the section on gender-based classifications, similarly identical to the policies served by the New York

registry for putative fathers procedure. Similarly, section 7017 does not violate equal protection any more than did the statute establishing the registry for putative fathers in *Lehr*.

In *Quilloin v. Walcott, supra*, similar equal protection contentions were also rejected. (The facts of *Quilloin* are set forth in the section on substantive due process.) Justice Marshall declared in *Quilloin* in language very relevant to this proceeding: " . . . [A]ppellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the state acted impermissibly in treating his case differently." (434 U.S. at p. 256.) Justice Marshall rejected the unwed father's equal protection arguments for the following reasons:

> "Although appellant was subject . . . to essentially the same child support obligation as a married father would have had . . . he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." (*Id.*)

Justice Marshall concluded: "Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child." (*Id.*) In short, the implicit argument in appellant's brief that anything less than absolute gender-neutrality in California's adoption and termination laws violates equal protection is completely in conflict with recent well-considered decisions of this Court from *Quilloin* to *Lehr*.

In *Caban*, Justice Powell said, "Gender-based distinctions 'must serve governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." This standard of review is sometimes called the intermediate standard of review. (See *Craig v. Boren*, 429 U.S. 190, 197 (1977).) What governmental

objectives is California attempting to achieve by employing the distinctions appellant complains of in section 7017? In a discussion of the Uniform Parentage Act's provision that consent to adoption need not be obtained from the unwed biological father, Professor Clark suggests that the theme of these statutory distinctions between unwed mother and unwed father is focused on maximizing "the children's opportunities for a suitable placement and a stable family life." (See Clark, p. 883.)

The California Supreme Court has itself identified the important governmental objectives served by the classifications established in section 7017. In *Michael U. v. Jaime B., supra,* 39 Cal.3d 787, a similar situation to the instant case was presented. A special class of fathers with no right to veto adoptions served important government objectives:

> "It is presumably detrimental to a child to award custody to a parent who is so unfit that the state might have to intervene to retrieve custody, but it also might be detrimental to place him with a parent who is not unfit, *depending upon the child's current circumstances and the available placement alternatives.*" (Emphasis supplied.) (39 Cal.3d 787, 796, fn. 8.)

The policy behind California's statutory scheme in this context facilitates a focus on the child by expediting placement and by emphasizing consideration of the child's present and current circumstances. Nor is such a statutory policy unfair to the father since he possesses remedies to move himself to another status, that of being a presumed father. This status gives the father new rights. But if the unwed father fails to seize such opportunities, the unwed father cannot be allowed to frustrate the state's important interest in securing an available placement.

An additional question remains. Under the standard of review set forth by Justice Powell in *Caban*, it is not enough to show the important governmental objective the state seeks to serve – in this case assuring the timely permanent placement of the child through adoption. The classification at issue must substantially relate to that

goal. Is creating a class of unwed fathers without a right to consent to adoption substantially related to this goal? Consider that the unwed father is not as identifiable as the unwed mother nor is he necessarily interested in fatherhood. The state responds to this biological reality by attempting to minimize the time the child is in a placement limbo at the same time that it gives equivalent opportunities to the unwed father once he comes forward and moves himself to the category of presumed father. The state is attempting to accommodate competing interests. If gender-neutrality is the only test by which this scheme is to be judged, then the rights of the newborn are unnecessarily subordinated since the newborn will be in placement limbo if equivocation on the part of the unwed father is allowed.

In *Michael M. v. Superior Court*, 450 U.S. 464 (1981), the Court was presented with the issue of whether California's statutory rape law violated equal protection since it made men alone "criminally liable for the act of sexual intercourse." (*Id.* at p. 466.) Justice Rehnquist, writing for the Court, upheld the statute against an equal protection attack. Justice Rehnquist declared that the state is persuasive that "a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution." (*Id.* at pp. 473-474.) In the statutory rape context, "already fraught with prosecutorial difficulties," the Court said it was unwilling to hold that California had to enact a statute so broad "that it may well be incapable of enforcement" to meet the requirements of equal protection. (*Id.* at p. 474.) So here, to enact a gender-neutral statute to govern the area covered by section 7017 would come fraught with delays jeopardizing the entire adoption process; it would also frustrate the need to make immediate placements of newborns who have mothers who cannot care for them and fathers who either cannot be found or who cannot make up their minds whether they wish custody or not. As the Court concluded in *Michael M.*: "[T]his Court has consistently upheld statutes where the

gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." (*Id.* at p. 469.)

The enormity of the need for speedy placement of illegitimate newborns is illustrated by the following: In California alone in 1986 out of 481,805 births, 127,457 (approximately 1 out of 4) were illegitimate (Vital Statistics of California – 1986, California State Department of Health Services, Sacramento, Calif.). It is therefore not surprising that California and the legislatures of eight of the other states who have, with some variations, enacted the Uniform Parentage Act have given an exclusive veto over adoption to the mother but not to the unwed father. (See Hawaii Rev. Stat., § 584-24; Kan. Stat. Ann., § 38-1129; Minn. Stat. Ann., § 257.74; Mont. Rev. Code Ann., § 40-6-25; Nev. Rev. Stat., § 128.150; N.D. Cent. Code, §§ 17-14-24; Ohio Rev. Code Ann., § 3107.06; Wash. Rev. Code, §§ 26.26.190, 26.33.120.) These laws reflect the policy that avoidance of delay and the need for immediate placement justify the gender classification in section 7017 (see generally: Krause, *The Uniform Parentage Act*, 8 Family Law Quarterly 1, 14 (1974).

In *Michael M.*, the Court observed: "The question whether a statute is *substantially* related to its asserted goals is at best an opaque one. It can be plausibly argued that a gender-neutral statute would produce fewer prosecutions than the statute at issue here." (*Id.* at p. 474, fn. 10.) The Court then mentions the contrary speculations of the dissent and concluded that, in such circumstances, deference should be given to the state supreme court which was familiar with the facts and the potential impact of the statute. (*Id.*) So here, appropriate deference should be given to the considered judgment of legislatures of the states who have enacted California's version of the Uniform Parentage Act.

The well considered judgment of the California Legislature represents a means substantially related to the achievement of an important state objective, i.e., the speedy permanent placement of illegitimate children for adoption. The regulation of family law has traditionally

been left to the states. (*Lehman v. Lycoming County Children's Services, supra,* 458 U.S. 502, 511.) This Court has only recently endorsed this historic aspect of our federalism. (*Lehman v. Lycoming County Children's Services, supra,* 458 U.S. 502, 511, 512-515.)

CONCLUSION

Although appellee contends that this Court has no jurisdiction of this appeal since appellant did not seek review in a timely fashion, appellee contends that if this Court decides this case on the merits, the decision, order and judgment of the California Court of Appeals, Fourth Appellate District, Division One, should be affirmed in all respects. The child who is the center of this controversy is now seven years old. She has resided with her adoptive parents for all but five weeks of her life. California law provided the opportunity to appellant to rear his child if he had clearly and unequivocally grasped the opportunity. He did not do so. To permit this belated assault on the fabric of the Moses family threatens their peace, security and due process rights. Furthermore, acceptance of appellant's plea to confer on the unwed father an indiscriminate veto over adoption would inject a novel and unpredictable element in the future of illegitimate newborns and in the relationship between the newborn and its adoptive parents with the gravest implications for the integrity and stability of the adoption process in California and, indeed, in the United States. In light of the foregoing, the decision, order and judgment of the Court of Appeals, Fourth Appellate District, Division One, should be affirmed in all respects.

Respectfully submitted,

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CALIFORNIA STATUTORY PROVISIONS

1. Civil Code Section 7017 (Stats. 1979, Ch. 752, sec. 2).

7017. (a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who had (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, unless the father's relationship to the child has been previously terminated or determined by a court not to exist or the father has voluntarily relinquished or consented to the adoption of such child.

(2) If a father relinquishes or consents to or proposes to relinquish a child for adoption, the mother shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, unless the mother's relationship to the child has been previously terminated by a court or the mother has voluntarily relinquished or consented to the adoption of such child.

(b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding

and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or unless the father has been served as prescribed in subdivision (f) with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to subdivision (c) of Section 7006 within 30 days of service of such notice or the birth of the child, whichever is later.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any othe appropriate person by the State Department of Social Services, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished, or in the case of a stepparent adoption, at the option of the board of supervisors, a licensed county adoption agency, the county department designated by the board of supervisors to administer the public social services program, or the county probation department. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments

or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department or the licensed adoption agency shall report the findings to the court.

(d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship within 30 days of serving such notice or the birth of the child, whichever is later. If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.

(e) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no

person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child.

(f) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action in this state, provided that publication or posting of the notice of the proceeding shall not be required. Proof of giving the notice shall be filed with the court before the petition is heard. However, if a person identified as the natural father or possible natural father cannot be located or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to such person.

(g) Any order requiring or dispensing with a father's consent for the adoption of a child may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court.

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2. Civil Code Section 7017 (Stats. 1986, Ch. 1370, sec. 2).

7017. (a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who has (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the

rights provided under Chapter 2 (commencing with Section 221) of Title 2 of Part 3 of Division 1 of the Civil Code, unless the father's relationship to the child has been previously terminated or determined by a court not to exist or the father has volunarily relinquished or consented to the adoption of the child.

(2) If a father relinquishes or consents to or proposes to relinquish a child for adoption, the mother shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221) of Title 2 of Part 3 of Division 1 of the Civil Code, unless the mother's relationship to the child has been previously terminated by a court or the mother has voluntarily relinquished or consented to the adoption of the child.

(b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or

unless the father has been served as prescribed in subdivision (f) with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to subdivision (c) of Section 7006 within 30 days of service of the notice or the birth of the child, whichever is later.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any othe appropriate person by the State Department of Social Services, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished, or in the case of a stepparent adoption, at the option of the board of supervisors, a licensed county adoption agency, the county department designated by the board of supervisors to administer the public social services program, or the county probation department. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department or the licensed adoption agency shall report the findings to the court.

(d) *(1)* If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given

notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship within 30 days of serving the notice or the birth of the child, whichever is later. If any of them fails to appear or, if appearing, fails to claim parental rights, his parental rights with reference to the child shall be terminated.

(2) If the natural father or a man representing himself to be the natural father, claims *parental* rights, the court shall determine *if he is* the *father. The* court *shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption.* If the court finds that the man *claiming parental rights is not* the father, *or that if he* is *the* father *it is in the child's best interest that an adoption be allowed to proceed, it shall* order *that* that *person's* consent *is not* required for an adoption; *such a finding terminates all parental rights and responsibilities with respect to* the child. *Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father.*

(e) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child.

(f) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action in this state, provided that publication or posting of the notice of the proceeding shall not be required. Proof of giving the notice shall be filed with the court before the petition is heard. However, if a person identified as the natural father or possible natural father cannot be located or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to that person.

(g) Any order requiring or dispensing with a father's consent for the adoption of a child may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court. (Italics added.)

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3. Civil Code Section 4600 (Stats. 1979, Ch. 915, sec. 3).

4600. (a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage,

and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragarph (2) or (3) of subdivision (b), the court shall consider and give due weight to the nomination of a guardian of the person of the child by a parent under Article I (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

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4. Civil Code Section 7006 (Stats. 1979, Ch. 752, sec. 1).

7006. (a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of

declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or purposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bear an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.

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5. Civil Code Section 7006 (Stats. 1986, Ch. 1408, sec. 3).

7006. (a) A child, the child's natural mother, or a man presumed to be the child's father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed

under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017. The parental rights of the alleged natural father shall be determined as set forth in subdivision (d) of Section 7017.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or purposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of the child or the birth of the child, whichever is later. The commencement of the action shall suspend any pending proceeding in connection with the adoption of the child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also, at his or her discretion, bring an action under this section in any case in which the district attorney believes it to be appropriate.

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OCT 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5840

In The

Supreme Court of the United States

October Term, 1988

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO,
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLANT'S REPLY BRIEF

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1. THE COURT HAS JURISDICTION AND THE RULE APPELLEE WANTS ADOPTED WOULD BE IMPRACTICAL AND BURDENSOME TO THE COURT

"Very few situations" permit review of state-court decisions where further proceedings remain to be determined in a state court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Appellee has cited none applicable at bar. Indeed, Appellee totally ignores several cases establishing jurisdiction submitted by Appellant. Brf.Aplt. 6-7.

The California Supreme Court remanded for review on the merits. A factual ruling favorable to Edward would have mooted his whole appeal. He was not truly an aggrieved party with standing until he lost the second time. Further, as debated by the California Court of Appeal, the definition of the best interests test with a required finding of detriment to the child from parental custody could have been grounded on constitutional standards in a parental rights termination case. It could have required a finding of something wrong with the father. Previous applications of the standard had been in custody cases.

With that constitutional issue, the definition of best interests/detriment, open, the federal legal issues had not all been decided. Requiring appeal in such a situation would force work on the Court when factual issues and constitutional issues remain to be resolved below; when the case might disappear in the further proceedings.'

It was not a situation where a ruling here could have terminated all proceedings, *Miss. Power & Light v. Miss. ex rel. Moore*, 108 S.Ct. 2428, 2438, n. 11, 101 L.Ed.2d 322.

337, n. 11 (1988), nor one where only ministerial acts remained and "no possible developments on remand could sufficiently minimize the risk of future constitutional harm to justify relief * * * Since further proceedings [could not] remove or otherwise affect this threshold federal issue the Court of Appeals' decision [was] final for purposes of review in this Court." *New York v. Cathedral Academy*, 434 U.S. 125, 128, n. 4 (1977).

> "(I)f the judgment does in fact contemplate further discretionary action on remand, this judgment is not final and cannot be reviewed by the Supreme Court even though the state court conclusively adjudicates the federal issues. Only after the highest state court renders another judgment on appeal from the additional discretionary action of the lower court following remand may review be had." Stern, Gressman & Shapiro, *Supreme Court Practice* 132 (6th ed. 1986).

> "It is one thing to hold that a litigant may seek early review of a state court decision because otherwise the federal constitutional issue might disappear or be eroded. But it is quite a different matter to hold that a litigant is precluded from review if, having carefully preserved his constitutional claims on the remand, he waits for the end of the state court litigation before bringing his federal claims to the Supreme Court. Finality is too practical a doctrine to be turned into such a trap for litigants and such an erosion of the Court's jurisdiction to pass on substantial federal claims in state court cases. Nothing in the Court's decision in *Cox*, or related cases, suggests that this result is mandated by the finality doctrine, as now interpreted." *Id.*, at 133.

Appellee's bright-line rule would force resort to the Court on many cases where further proceedings in lower courts could eliminate the case. It is not practical.

Having correctly conceded that the issues were passed upon below, Brf.Aplee. 10, and having demonstrated no reason why the Court cannot rule, Appellee has failed to raise any meritorious objection to jurisdiction. The Court should proceed to the merits.

2. TERMINATION OF PARENTAL RIGHTS AND EQUAL PROTECTION ARE THE ISSUES PRESENTED

A. Katie's custody is not at issue before the Court, nor will it necessarily change if the judgment terminating Edward's parental rights is reversed and remanded

Edward asks the Court to reverse the judgment terminating his parental rights and to direct the trial court to terminate his parental rights only if he is found to come within section 224 or 232. That is, essentially, unless he is unfit (incapable as a parent) or has neglected or abandoned Katie. That would give him equal treatment with other fathers, wed and unwed, who have crossed the threshold to fatherhood and with mothers.

The California courts have consistently held that these tests cannot be met as to Edward. J.S. 6a, 49a. It is unlikely anything will have changed since; he certainly has not abandoned Katie through seven years of litigation.

That will mean the attempted adoption was invalid and Edward's parental rights will be preserved. No adoption will be permissible without his consent, and he will be able to seek custody, visitation, pay support, and be a full participant in Katie's life.

> "The judgment or order may contain any other provision directed against the appropriate party to

> the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement." Cal. Civil Code, § 7010(c).

The test for custody and visitation will be the best interests of Katie, with Edward getting the benefit of parental preference. § 4600, J.S. 70a; *Griffith v. Gibson*, 73 Cal.App.3d 465, 474, 142 Cal.Rptr. 176 (1977); *In re Tricia M.*, 74 Cal.App.3d 125, 137, 141 Cal.Rptr. 554 (1977), *cert. den.*, 435 U.S. 996 (1978); see also, *In re B. G.*, 11 Cal.3d 679, 696, 114 Cal.Rptr. 444, 523 P.2d 244 (1974) (several custody proceedings available, all with parental preference).

On remand, all parties will be entitled to due process and equal protection. In view of events, it is not likely that Edward will get custody. But he can still develop, or have the opportunity to develop, a father-daughter relationship. Otherwise, he is completely out of the picture, all rights having been terminated. § 229.

B. Having crossed the threshold to protected parenthood, Edward is entitled to the same protection as other protected parents

No mother in California—or anywhere else in the United States—could lose her parental rights just because custody at the time with someone else was in the child's best interests. No presumed father in California could, either.

Edward promptly came forward (under California law and on the facts as litigated below) and sought to assume

full parental responsibility. Contrary to the County's assertions that he did not then and does not now seek custody and full parental rights, Brf.Aplee. 24, 31, 37, the facts show Edward's vigorous pursuit of those responsibilities for seven years, and counting. Brf.Aplt. 10-16. If he had not sought custody, he could not have tried to stop the adoption; that was the issue under the statute. § 7017 (d), J.S. 72a.

Edward has demonstrated a full commitment (few could demonstrate more) and came forward promptly to participate in rearing Katie. He did all he could under the circumstances. J.S. 12a. Nothing, legally or factually, showed he should have been deprived in 1981. J.S. 49a. He is entitled to substantial protection, but was denied even opportunity. *Lehr v. Robertson*, 463 U.S. 248, 261-262 (1983).

The amorphous and debatable custody standard, the best interests test, is significantly different from the specific facts which must be proved against other protected parents. The propriety of terminating parental rights in the best interests of the child is an issue reserved by the Court. *Caban v. Mohammed*, 441 U.S. 380, 394, n. 16 (1979). (The Court hardly "implicitly approved" the test in *Santosky v. Kramer*, 455 U.S. 745, 760, n. 10 (1982), as the trial court refused to terminate on a no-fault basis and the Court expressed doubts about using such a standard.) Here it is the difference, a highly prejudicial difference, that is presented as an issue on equal protection grounds.

Edward was identified as the father and adjudicated to be the father. The mother relinquished Katie. Edward came forward to be the fully committed parent, and the

County spirited Katie away. The County and its row of *amici* from the adoption industry rely on that possession as 100 points of the law, to allow them to prevent a relationship from forming, if they deem that best. The conduct was unjustified. J.S. 16a-21a.

The judgment permitting adoption without Edward's consent should be reversed. A clear message should be sent establishing the rights of fathers who have crossed the threshold to a protected parental interest.

3. EDWARD IS NOT AT FAULT FOR DELAYING HIS COMMITMENT TO KATIE OR THE JUDICIAL PROCESS

A. The County's contention that Edward was required to file a petition and could have thus stopped the adoption overlooks the law

First and foremost, the pleading requirements are issues of state procedure and practice. The County never raised the claim below. The California Supreme Court held that Edward had followed the available procedure and fully protected his legal rights:

> "(I)f the father is merely a natural father and not a presumed father, the mother alone is entitled to the child's custody. *Only when the natural mother relinquishes the child for adoption* do the natural father's rights commence. (§ 7017, subd. (d).) He is to be notified and his custodial rights, if claimed, determined before the adoption can proceed." J.S. 43a, footnote omitted, emphasis original.

> "In the context of section 7017, the mother must relinquish the child for adoption before the natural father has any rights." J.S. 44a.

The Court of Appeal agreed: "Edward appears to have done everything he reasonably could have to establish a parent-child relationship with Katie." J.S. 12a.

Edward had an option to file a petition or wait to oppose the petition the County proposed to file, according to the adoption worker who undertook to give him legal advice. Nothing was said about different effects from one course or the other. Brf.Aplee. 2-3. That option was available, and Edward had 30 days after the County filed to make his claims to paternity and to custody. § 7017(d), J.S. 72a. He was prompt. J.S. 18a.

Edward filed *pro se* asking for full affirmative relief as described in sections 7006(c) and 7017(d): retention of parental rights and legal and physical custody of Katie. J.A. 5. No objection was ever raised to the timeliness or sufficiency of the pleading. Brf.Aplt. 11, n. 4.

Throughout two trials and appeals, the issue was Edward's right to custody, with that he would retain parental rights. All issues were litigated by consent and the County's challenge cannot be heard now. 5 B. Witkin, *Cal. Procedure,* Pleading, § 1142, pp. 557-559 (3d ed. 1985). For all purposes at trial and on appeal Edward's request for affirmative relief was treated as a section 7006(c) request as required by section 7017(d).

Second and very important, no matter how and when raised, the ultimate issue was Edward's right to custody, necessary to stop the adoption. (A 7006(c) petition would stay the adoption while pending, but not stop it, unless, that is, he got custody and became a presumed father. The court could try the same custody issue first under section 7017(d) and did so, giving the same practical result.) If

he had filed first and failed to get custody, the ruling might have prevented him from getting custody and stopping the adoption. Ordinary *res judicata* and collateral estoppel principles would have applied. The custody determination standards are the same regardless of the procedural niceties and who filed first. J.S. 42a; *In re Tricia M.*, 74 Cal.App.3d 125, 136-137, 141 Cal.Rptr. 554 (1977), *cert. den.*, 435 U.S. 996 (1978). No different result would have come from Edward's being the first in time.

In contrast, a judgment giving him visitation and a support obligation would not necessarily have got him custody and presumed father status. *Griffith v. Gibson*, 73 Cal.App.3d 465, 469, 472-473, 142 Cal.Rptr. 176 (1977). Thus, a 7006(c) petition would not necessarily have resolved the custody issue, forcing full proceedings anyway after a 7017(d) petition was filed.

The County's claim that Edward failed to pursue necessary state remedies is contrary to state law and law of the case.[1]

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[1] *Amicus* Barker Foundation blames Edward for failure to request an "expedited appeal." Brf.BarkerFdn. 4, n. 3. No authority is cited for such a procedure in California; there is none. Once the record reaches the appellate court, a motion may be made for calendar preference, Cal. Rules of Court, Rule 19.3, but that does not advance preparation of the record in the trial court or even shorten the briefing times. Rule 39(e), Cal. Rules of Court, is largely precatory and self-operating. *Amicus* remains blissfully unaware of California practices and calendars. The delays belong not to Edward, but to the courts, as the Court of Appeal confessed. J.S. 13a, 15a, n. 1.

Of course Edward contends that he was denied equal protection because his parental rights were terminated on transient custody grounds. He submits his rights could constitutionally be terminated only for unfitness, neglect, or abandonment. Therefore, custody should not have been the issue whether under section 7006(c) or section 7017(d).

Because custody was an unconstitutionally considered issue (until the termination of parental rights issue was properly determined), he should not have had to plead for custody relief. It makes no difference if, or how, or when custody was claimed, except to show Edward demonstrated full parental commitment. The County's pleading issue is irrelevant to the equal protection issues presented.

E. Edward committed to Katie promptly

After first learning of Katie's birth on August 1st, Edward contacted the adoption worker on August 3rd and made an appointment for August 5th which he kept. He consistently refused to give up his legal rights while considering this major development in his life. The adoption worker who undertook to advise him, Brf.Aplee. 2-3, did not tell him he had any time limits or that he must immediately request custody or lose his rights—the position the County now argues.

On August 17th, after carefully considering his situation and his and Katie's future—and after seeing her for the first time and learning he might never see her again—he requested custody. That was before Katie was one-month old, seventeen days after the surprising news, and twelve days after he first talked to the adoption worker.

It was also seven days *before* Katie was placed with prospective adoptive parents—the placement the County and *amici* rely on to subplant the constitution. J.S. 16a-18a; Brf.Aplt. 9-11. Katie was never in limbo, uncared for. She was with the County from leaving the hospital. Brf.Aplt. 10. Asking sooner would have brought the same treatment.

All of these arguments were made below. They were ignored by the lead opinion, but expressly rejected in the concurring opinion. J.S. 21a-22a.

The state court's treatment is significant. The issue first is a fact question to be reviewed on the record; no state law required faster action. As a question of law, it is a matter of state adoption policy. If the state courts see no factual or legal basis for requiring absolutely immediate response (and preventing mature consideration) there is no constitutional requirement. (Much of the adoption proponents' theory would require California to impose restrictions on unwed fathers it has not seen appropriate, e.g., faster responses, shorter pleading times.[2])

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[2] Given their premises, the adoption proponents would elevate adoption and its processes to a constitutional status above parenthood, subordinating all to an efficient system allowing the adoption lawyers and workers to place children where they felt best.

Is is easy to become zealous for a cause, or money, or a job, and to become myopic, if not self-satisfied. Aldous Huxley captured the essence of the danger:

> "There seems to be a touching belief among certain Ph.D.'s in sociology that Ph.D.'s in sociology will never be corrupted by power. Like Sir Galahad's, their strength is as the strength of ten because their heart is pure—and their heart is pure because they are scientists and have taken six thousand hours of social studies.

(Continued on following page)

California decided Edward had acted properly and there was no reason to deny him full parental rights and custody in 1981. That should settle the claim that he did not respond quickly enough in August of 1981.

The County is still trying to hold Edward's exercise of mature judgment against him by arguing he does not now seek custody and has abandoned any interest in her. Brf.Aplee. 24, 31, 37. But he has always sought custody. J.A. 5; Brf.Aplt. 12-16. He just recognizes that custody and the father-daughter relationship must come slowly now because of the interruption by the County; a transition is needed now and full custody might not be available no matter how much he desires it. That is a demonstration of his mature judgment and concern, not an abandonment.

The County's argument is nonsense. Only by retaining parental rights may he ever seek custody; visitation is part of the custody powers of the court. It is the forcible separation of Edward from Katie and she from him that has altered—created—the whole situation past and present. Edward did not abandon Katie—ever.

Curiously, the County argues that the Katie-Moseses relationship should be given so much deference that it

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> Alas, higher education is not necessarily a guarantee of higher virtue, or higher political wisdom." A. Huxley, *Brave New World Revisited* 28 (Perennial Library, Harper & Row, N.Y., 1958, 1965)

That is not to denigrate integrity, just to caution against special interests under color of impartial expertise, bent on doing good even where it is not needed.

overcomes Edward's constitutional right to know Katie and her constitutional right to know him, but when Edward gives some recognition to that relationship artificially created by the County they say Edward has abandoned his rights.

California found that Edward should have been given custody and full parental rights at the 1981 trial when Katie was five months old. A delay of a few days in demanding custody (while refusing to surrender his rights), if that qualifies as delay, and asserting his rights within the allowed time to plead was not harmful to anyone, including Katie. Edward did not fail to timely commit to fatherhood.

4. THE COUNTY IS TRYING TO AVOID THE ISSUES

A. No absolute veto over adoptions is sought for anyone, let alone all unwed fathers

The County and its supporters diligently try to make the case into something not presented on the facts or the briefs. They strive to convince the Court that ruling for Edward would give *all* unwed fathers an *absolute veto* over any adoption. Brf.Aplee. ii, 9; Brf.BarkerFdn. i(2), 12; Brf.Natl.Com. 1.[3]

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[3] A brief was also filed by Christian R. Van Deusen purporting to represent Katie (who is not a party to the proceedings here or below) *amicus curiae* and making a motion to dismiss or affirm, quite a bit late. Assuming the Court treats this document as an *amicus* brief in support of Appellee, it essentially says that the California statute is constitutional because California likes it. But that begs the question which is whether California may enforce the statute against men situated sim-

(Continued on following page)

No such issue is presented. No such rule would follow from reversing the judgment at bar on equal protection grounds.

Edward does not even suggest that *all* unwed fathers should be in the same position he is in. To the contrary, he distinguishes himself from those who show no interest and have not crossed the threshold to a protected parental interest. He has manifested significant interest to the full extent the facts and law allowed. J.S. 12a. He has been wrongly put in the same category as those who show no interest and lost parental rights. He is wrongly in the same class as the unwed fathers who cannot be found; that is the heart of his case.

Further, he does not request an "absolute veto" of anything. His rights still could be terminated; it just would have to be done on the same grounds as apply to other parents with a protected interest under the statutes (perhaps parents with even less real parental interest in their child). That is not a veto. It gives no weapon, or undue advantage, or ability to interfere capriciously. (On the other hand, the County supports the absolute veto given to all mothers, regardless of actual interest, despite the obvious discrimination.)

(Continued from previous page)

ilarly to Edward. It also addresses issues, like veto power for all, not raised by Edward, perhaps because the brief was filed at the time the Brief for Appellant was filed. Otherwise, the document is a "me, too" exercise favoring easy adoption and plenty of adoptable babies to be placed by lawyers or agencies.

Their closest statement to the real issues at bar is Appellee's Question IV: May states distinguish between fathers "manifesting unequivocal concern" for their children and those fathers who do not? Brf.Aplee. i. If Edward had been given that treatment as one who showed such interest, the case would not be here. He manifested that concern but was treated as one who did not.

All California courts have agreed that he manifested significant interest in taking full parental responsibility—necessary to even get into court—and that he should have had custody. Yet, he was denied any parental rights. He was lumped with unwed fathers who show no interest. He was classed with a group to which he did not belong under a presumption that he would not show interest in his child. Brf.Aplt. 33-35.

Their insistence on arguing against strawmen is but a device to avoid addressing the issues.

B. The County is trying to raise potential due process problems not presented on the record

Much of the County's brief is devoted to due process arguments. Brf.Aplee. 19-37. Typically, Appellee wants to change the case. The County apparently feels more comfortable avoiding the denial of equal protection—which no one really denies was denied—and addressing a multitude of issues not presented by the facts.

Fears are expressed about not knowing who the father is or not being able to find him. But Edward was known, was found, said he was the father, and was adjudicated the father by stipulation. Brf.Aplt. 11.

The finality of judgments rule will preserve completed adoptions. Many states already require what Edward requests, termination on unfitness, etc., grounds. California already gives the right to notice and a hearing, as do other states. In sum, the specters raised are not realistic and are not impediments; nor are they presented at bar.

Edward is getting processed well beyond what is due. What he and Katie (she has a right to know her father) desire is equal protection. The denial of equal protection is clear in the differing standards for mothers and for other unwed fathers, presumed fathers, many of whom may have manifested much less interest than Edward.[4]

5. NO IMPORTANT STATE INTEREST IS SERVED BY THE DISPARATE TREATMENT

A. An important state interest must be served to justify the discrimination under the heightened scrutiny test

Edward was treated significantly differently from all mothers and presumed fathers. There really is no challenge to that premise. He also had acquired a protected interest. The County wrongly claims that he never sought custody and argues that he delayed too long while considering requesting custody. But he acted within the time re-

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[4] Most of the cases in the field hold on both due process and equal protection, so it is hard to avoid cases which discuss due process. Brf.BarkerFdn. 10, n. 5. The Court is most sensitive to equal protection where denial deprives a party of due process rights. But the overly-broad class and disparate treatment here are better defined on equal protection analysis.

quirements of law and California found no harm or undue delay in fact. The defenses are specious, at best.

That leaves the issue of whether the disparate treatment bears a substantial relationship to achieving important governmental interests, with a persuasive justification. Brf.Aplt. 27-28. The adoption industry finds the state interests in quick placement and saving mothers from embarassing or difficult decisions.

B. California did not find a basis for sex discrimination

The critical point is that California never justified the discrimination. It is California's adoption policy and its state interests which must be served. California gives notice to fathers and hearings. So slowing of the process by hearings is not an issue. (With specific proof required situations might be handled faster. Cases could be evaluated on the facts without open-ended psychological testimony in nearly every "best interests" case.)

Quick permanent placement is not an issue when the mother's rights are being terminated. Even newborns must have been abandoned for six months, § 232(a)(1), Brf. Aplt.S.A. 3b, and reunification must be attempted. § 232 (a)(7), Brf.Aplt.S.A. 7b.

Moreover, the state interest is not in adoption, but in parental rights:

> "'(I)n our rush to insure the stability and efficiency of the adoption process, it is apparent that the rights of the parties involved—particularly the unwed father—may well suffer. • • • (I)t makes no more sense

> to insist that all unwed fathers are disinterested and unfit parents than it does to continue in the belief that all mothers are by nature interested in raising children.'" *In re Tricia M.*, 74 Cal.App.3d 125, 135, 141 Cal.Rptr. 554 (1977), *cert. den.*, 435 U.S. 996 (1978).

The California Supreme Court embraced this view and rejected the distinction between mothers and fathers:

> "The actions of *both* parents after the birth of their child determine their ability to accept parental responsibility. An unwed mother may have had no more desire to conceive or knowledge of the conception than the unwed father. Nevertheless she is given a choice to keep or relinquish the child because she gave birth. Her decision to release the child for adoption should not deprive the father of a meaningful opportunity to retain and develop his relationship." J.S. 48a-49a.

Certainly the relief Edward seeks would not imperil mothers or adoptions as far as California is concerned. California's law should not be rewritten by this Court to please Appellee.

C. Governmental policy does not require, or permit, overriding competent parents in favor of third-party adoptions

Appellee and its cadre find support for the obvious sex discrimination in the fact that seventeen states have adopted some version of the Uniform Parentage Act, but California's version is unique. Brf.Aplee, 15, n. 11; Brf.Barker Fdn. 2, n. 2. There is no national consensus supporting the County's position.

Several states require proof of unfitness to terminate the rights of an unwed father. Brf.Aplt. 39-40. The Texas law relied upon to vindicate quick adoptions, Brf.Aplee. 42-43; Brf.Natl.Com. 11-12, was overruled. Notice and hearing on equal footing are now required to terminate. *In Interest of McLean*, 725 S.W.2d 696 (Tex. 1987) (no "best interests" sex discrimination, at 698).

The several policies the County contends require favoring adoptions are also served by placement with an able, caring parent. This father has demonstrated a "legal and moral commitment to fatherhood" (having crossed the threshold), Brf.Aplee. 43, and custody with Edward would eliminate the need for any state guardianship; the father would have willingly taken the burden of parenthood. Surely, his "opportunities to develop and enjoy deeply satisfying parent-child relationships," Brf. BarkerFdn., 11, are at least as important as those of childless couples. Most of us think more so.

Katie also has a right to know and love her father and to get his emotional and financial support.

Again, there is no special right for the adoption process. It is a beneficial institution, but only when the biological family cannot be maintained. J.S. 20a-21a. The state registers no gain when it separates children from the custody of fit parents. J.S. 20a, citing U.S. cases. "(T)he State's goal is to provide the child with a permanent home," *Santosky v. Kramer*, 455 U.S. 745, 766, not just an adoptive home. The State's interest is *de minimis* if the father is fit. *Stanley v. Illinois*, 405 U.S. 645, 657-658 (1972).

This mother had, it should be remembered, elected out of parenthood, and Edward was available for quick, beneficial, permanent placement.

Making adoption easier does not justify the discrimination. Indeed, the argument is merely another version of making life easier by presumption, an approach rejected in *Stanley, supra*.

D. The arguments favoring adoption lack merit

The County makes several miscellaneous arguments, but none have merit.

If easy adoption is the goal, why should either parent have to consent? Let the decision makers choose.

If possession is the key, why have hearings at all?

It takes gall to argue that Edward failed to develop a relationship with Katie when she was spirited away and Edward was deprived of contact, even the right to pay support. J.S. 19a; § 229. If the Court protects only relationships developed for at least two years, no unwed father could achieve parenthood of a newborn or an infant, even when the mother relinquishes. The mother and the state would have absolute control; it defies reason. J.S. 19a-20a.

Every fear of nefarious scheme or spite could apply to mothers, too.

Every argument for dispensing with a father's consent can be used to dispense with a mother's consent. Every good to be legitimately claimed from adoption will be met by placement with an able and loving father. Their arguments prove too much.

No mother will be forced to keep an unwanted child; this one was not. Nor should a mother's embarassment at having the child's birth known be given greater constitutional status than the rights of the father and the child. The Court simply is not in the business of promoting adoption above parenthood nor increasing the supply of adoptable babies.

This is not a stepparent adoption as in *Quilloin v. Walcott*, 434 U.S. 246 (1978) or *Lehr*.

The emotionally-charged arguments lack merit.

CONCLUSION

The choices the County wants unwed mothers to avoid and the impediments to easy adoption feared by

the adoption advocates already arise in California (and most states): the process is slowed by notice and hearing; the unwed father may get custody contrary to the mother's wishes. California and most other states find no problems with recognizing those rights.

Edward achieved a protected interest and should not be categorized with fathers who show no interest. The question is then: Once a father with a protected interest gets notice and hearing, on what grounds may his parental rights be terminated? Edward submits: Only on the same grounds as other parents with protected interests; in California under sections 224 and 232.

On remand, the court will consider custody and visitation as well as support. The trial court found Edward a good and loving father and encouraged contact. J.S. 5a. All experts agreed that some contact would benefit Katie, although extent and circumstances were subject to differing opinions. There is no reason to expect that Katie would be harmed; she would benefit. Anyway, future relations will be subject to court order. But a clear message should be sent to adoption agencies and courts that the conduct exhibited here is unacceptable.

The classification and grounds used to terminate Edward's parental rights denied him equal protection of the law. The judgment terminating parental rights should be reversed.

Respectfully submitted,

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Counsel for Appellant

MOTION FILED
JUN 29 1988

No. 87-5840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD MCNAMARA,

Appellant,

—v.—

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF APPELLANT

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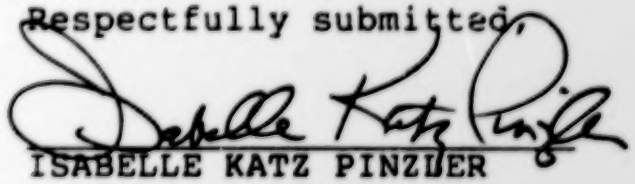
MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF SAN DIEGO AND IMPERIAL COUNTIES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union and the ACLU of San Diego and Imperial Counties, hereby move for leave to file the attached brief amicus curiae pursuant to Rule 36.3 of the Rules of this Court. Appellant has consented to the filing of this brief. Counsel for Appellee, however, has been unwilling either to consent to the filing of this brief or to refuse to consent.

This case involves an important and unsettled question of whether a state may terminate the parental rights of an unwed father who has consistently shown an interest in his child under a legal standard that would not be applied to an unwed mother in similar circumstances. Amicus believes that like all gender based distinctions, the one at issue here ultimately harms women, that it

violates the Equal Protection Clause of the Fourteenth Amendment, and that the lower court decision terminating completely appellant's parental rights was erroneous. Accordingly, amicus respectfully moves for leave to file the attached brief amicus curiae in order to present the Court with our views on this important case.

Respectfully submitted,



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INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender based discrimination. It has participated, both directly and as amicus curiae, in the litigation of many cases before this Court and lower courts challenging sex discriminatory practices. The ACLU of San Diego and Imperial Counties is one of the ACLU's local affiliates.

As framed by the parties, the issue in this case is whether the State of California may terminate the rights of an unwed father who has consistently shown an interest in his

child under a legal standard that would not be applied to an unwed mother in similar circumstances. Because the ACLU believes that such gender-based tests violate the Fourteenth Amendment regardless of which gender they apparently disfavor, we respectfully submit this brief as amicus curiae.

Introductory Statement

By all accounts, appellant, Edward, is eager to assume parental responsibilities and would be a willing and competent father. Nevertheless, for the last eight years he has been denied the opportunity to establish a relationship with his daughter, Katie, based on an improper termination of his parental rights shortly after his daughter's birth.

Appellant's relationship with Katie's mother lasted for several months during the

fall of 1980. When the relationship ended in November, neither of them knew she was pregnant. Katie was born on July 18, 1981. While in the hospital, the mother requested adoption assistance, met with a social worker, and placed the child in a foster home three days later. She had never informed Edward of the pregnancy and did not tell him of Katie's birth until August 1, 1981.

Edward immediately contacted the San Diego Department of Social Welfare to determine his rights. He met with a social worker on August 5 and requested that his daughter be placed with the family who was then providing day care for his sons. Later that day, the mother formally relinquished Katie for adoption and rejected Edward's placement request, stating she wished the child placed with a family neither of them knew.

On August 10, a petition to terminate

Edward's parental rights was filed pursuant to California Civil Code §7017.[1/] That same day Edward again met with the social worker,

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[1/] Former California Civil Code, §7017, subdivision (d) (2), in effect at that time, provided in pertinent part:

> "If ... the natural father is identified to the satisfaction of the court ... (he) shall be given notice of the proceeding in accordance with subdivision (f), ... If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parental and custodial rights in whatever order it deems proper. If the court finds the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child." (Emphasis added.)

California Civil Code §7004(a) provides that a man may be a "presumed father" either pursuant to §621 of the Evidence Code (i.e., that he is the legal husband of the mother and is not impotent or sterile) or if 1) he and the mother are or were married at the relevant time, 2) he and the mother attempted marriage before the birth, even if the marriage was or could be invalidated, 3) he and the mother married or attempted marriage after the birth and he was named on the birth certificate (with his consent) or he had voluntarily promised in writing to support the child, or 4) he received the child into his home and held the child out to be his natural child.

discovered the mother had relinquished the child for adoption, and expressed his fear that he would be unable to see his child. He arranged to visit the child at the agency offices on August 17, at which time he specifically requested custody for himself. Despite Edward's wishes, Katie was placed with prospective adoptive parents on August 24.

Appellant's termination hearing was not held until December, 1981, at which time the court found him to be the biological father and "a good parent [who] can provide a good, loving home for this child." See, In Re Baby Girl M., 37 Cal. 3d. 65, 68 (1984). At the same time, the court determined it was in the child's best interests to remain with the adoptive parents and, on that basis, terminated Edward's parental rights. Id.

Following a protracted appellate process, this termination decision was

ultimately upheld on a new ground -- that Katie's removal from her adoptive parents, by now the only family she had ever known, would be detrimental to her. In Re Baby Girl M., 191 Cal. App.3d. 786 (1987), (Order of Court of Appeal.) Thus, the State first improperly interfered with appellant and Katie's parent-child relationship early in her life, and then relied on the delays coincident with Edward's lawful attempts to remedy the situation to estrange him further.

Moreover, even the "detriment" standard ultimately applied in this case placed appellant at a significant disadvantage under California law. By contrast, a mother's parental rights can only be terminated in California based on a showing of unfitness, inter alia, due to abandonment, neglect or cruelty, habitual drug or alcohol use, conviction of a felony, physical or developmental disability, etc., pursuant to

California Civil Code §232, or if she consents, pursuant to California Civil Code §224.

Because appellant (like the mother in the Biblical custody dispute resolved by King Solomon) recognizes that a grant of custody to him at this time might indeed be found to be detrimental to his daughter, he seeks only to prevent a total severance of his parent-child relationship with Katie; he seeks the right to visit her and to develop the kind of relationship enjoyed by many thousands of non-custodial parents and their children, a relationship often sought by adopted children with their biological parents.[2/]

[2/] See, e.g., J. B. Triseliotis, In Search of Origins: The Experiences of Adopted People (1973); Sorosky, Baran, & Pannor, "The Reunion of Adoptees and Birth Relatives," 3 Journal of Youth & Adolescence 195 (1974).

SUMMARY OF ARGUMENT

Given the nature of appellant's request for relief, it is important to define with care the issues that are and are not before the Court. The present controversy is over termination, not custody. Moreover, this Court need not become enmeshed in the state law distinction between "best interests" and "detriment" as a standard for determining the parental rights of unwed fathers.[3/] Rather,

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3/ California Civil Code §7017 (d) (2) now reads in relevant part:

> "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, ... If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that the person's consent is not required for an adoption; such a

(footnote cont'd)

the relevant question facing this Court is the same question faced by the original Family Court judge in 1981 when Katie was only five months old: can a competent and willing unwed father's parental rights constitutionally be terminated, without his consent, under a "best interest" (or "detriment") test that would not be applied to a mother in a similar situation.

This Court has never ruled on the precise standards necessary to extinguish a parent-child relationship so that a child may be adopted by strangers. It has emphasized, however, the constitutional significance of the parent-child relationship, see, e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); Smith v. Organization of Foster Families, 431 U.S. 816 (1977), while at the same time

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> finding terminates all parental rights and responsibilities with respect to the child." (Emphasis added.)

recognizing the importance of non-traditional family relationships, Moore v. East Cleveland, 431 U.S. 494 (1972), and recognizing the often damaging consequences of long term state foster care custody to children, Smith v. Organization of Foster Families, 431 U.S. at 836-37.

In evaluating this case it is significant to note that the mother has voluntarily relinquished her rights. Compare Lehr v. Robertson, 463 U.S. 248 (1983). Appellant was, therefore, the only biological parent left on the scene. The decision to terminate his parental rights based on a legal standard that only applies to unwed fathers cannot be sustained under the Equal Protection Clause.

ARGUMENT

I. CALIFORNIA CIVIL CODE SECTION 7017(d) DISCRIMINATES ON THE BASIS OF GENDER

In a sense, this case picks up where Caban v. Mohammed, 441 U.S. 380 (1979), and Lehr v. Robertson, 463 U.S. 248 (1983), left off, and it compels answers to many of the questions left open by those cases. We deal here, in effect, with a termination of parental rights in infancy. On the one hand, the California courts cut off Edward's parental rights and obligations before he had an opportunity to live with the child, support her financially, or establish any sort of relationship with her. He was thus deprived of the opportunity to take those steps, which are effectively required under Caban and Lehr, in order to stand on an equal legal footing with the birth mother. Instead, he has taken the only path open to him to establish this relationship -

continued litigation and appeals.

Unlike the fathers in Caban and Lehr, however, he does not seek to limit the rights of Katie's natural mother, who consented to the adoption and surrendered all rights years ago. Thus, this is not a case where a mother of a non-marital child seeks to sever the child's legal ties to the father in order to facilitate adoption by her husband;[4/] it is not even a custody dispute between two unmarried parents. Rather, appellant contests the right of the State to sever his parent-child relationship on grounds which patently discriminate on the basis of sex.

Absent a higher substantive showing than was made against appellant here, California's law prohibits terminating the parental rights

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4/ Compare Lehr v. Robertson 463 U.S. at 262 n.19; and Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never lived before.")

of an unmarried mother unless the mother expressly so consents. Yet, in this case, California has terminated the parental rights of an unmarried but acknowledged father despite a specific finding of fitness and in the face of his manifest and persistent refusal to consent.

Amicus recognizes that, under California law, some classes of fathers are treated equally with some classes of mothers on the issue of termination. For example, the termination standard that applies to mothers also applies to married fathers, fathers who attempt marriage, and fathers, even if not married, who take the child in question into their homes and openly hold the child out to be their natural child. See California Civil Code §7004 (a).

Fathers like appellant, however, have been granted a significantly diminished status under California law. Unmarried

mothers who, for whatever reason, do not take their child into their home, are nonetheless legal mothers of those children, and their parental rights cannot be severed absent their consent or a showing of unfitness or abandonment, supra p.6-7. By contrast, appellant's parental rights were first terminated on a "best interests" standard and then on a "detriment" standard. No one contends that either of these standards is equivalent to the standard that would be applied to a mother in equivalent circumstances. There is thus a clear gender based distinction in this class of cases, depriving only men of their parental rights and depriving their children of a legal relationship with their biological fathers.

This Court has repeatedly reaffirmed that such gender-based statutory distinctions must meet "the burden of showing an exceedingly persuasive justification for the

classification....," Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). State action that explicitly allocates benefits and burdens on the basis of sex

> must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause.

Caban v. Mohammed, 441 U.S. at 388 (1979), citing Craig v. Boren, 429 U.S. 190, 197 (1976). The only question in this case is whether California Civil Code §7017(d) meets this test.

II. THE GENDER BASED DISTINCTION IN CALIFORNIA LAW IS NOT CLOSELY AND SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENTAL PURPOSE

To the extent that the State articulates an important governmental purpose in this case, it is to prevent "detriment," i.e.

psychological harm to the child by removing her from the only family she has ever known. Yet, as previously noted, the question of custody is not involved in this case in its present posture. See p.7, supra.[5/]

By relying on "detriment" to terminate appellant's rights, the State has boot-strapped an injury that it caused itself, first by preventing appellant from taking custody of his child and then in prolonging the legal process to the point where removal

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5/ Everyone, including appellant himself, recognizes that custody may be denied to a parent even in favor of a non-parent under California Civil Code §4600, subdivisions (a) and (c) which provide in pertinent part "In any proceeding where there is at issue the custody of a minor child, the court may, ... make such order for the custody of the child during minority as may seem necessary or proper [¶] Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child..." (Emphasis added.)

of the child would be harmful to her.[6/]

Were this simply a dispute between appellant and the State, it would be easy to say that the State's initial misconduct should not and could not be used against appellant in determining the scope of his present rights. Because the rights of a child are also involved, the calculus becomes more complicated.[7/] But whatever standard

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6/ In other contexts, this Court has appropriately recognized the importance of prompt adjudication in order to prevent the evaporation or transformation of important constitutional rights mainly through the passage of time. See Freedman v. Maryland, 380 U.S. 51, 54-55, 59 (1965); Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___ No. 86-1042 (June 17, 1988), slip op. at 19. If nothing else, this case demonstrates the need for similar due process quidelines when the State moves to terminate parental rights.

7/ For precisely this reason, children should be entitled to appointed counsel in any custody hearing. It is unrealistic to assume that the child's interests are congruent with either parent or parents or the State. Yet, in many ways, it is the child who has the most at stake. In this case, Katie was apparently unrepresented throughout these proceedings. One function that counsel for the child might have performed is to insist on expeditious decisionmaking. See n.6, supra.

California uses in terminating the parental rights of an unwed parent, it must be the same for both parents.[8/] The standard applied to mothers is plain: desertion, relinquishment, or, in certain cases, failure to pay for care, support, and education. Civil Code §232. Fathers are entitled to be judged by the same rule.

A. This Gender Based Distinction Is Not Supported By a State Interest In Encouraging Adoption Of Non-Marital Children

The State has an interest in encouraging the incorporation of non-marital children into adoptive new homes in order to ensure

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8/ Because of the gender discrimination inherent in California's statutory scheme, this case does not require the Court to determine the constitutional limits of a gender-neutral termination standard. Any such standard must, in our view, take into account the child's interest in a permanent and stable home. On the particular facts of this case, however, that interest is unlikely to be disturbed regardless how the termination question is resolved.

stability and to remove the stigma of illegitimacy.[9/] "But the unquestioned right of the State to further these desirable ends is not in itself sufficient to justify [a] gender-based distinction." Caban, 441 U.S. at 391. Moreover, any distinctions must be reasonably structured to further the State's ends. Id. The Caban Court, while explicitly reserving the question of newborn adoptions, 441 U.S. at 392 n.11, identified two areas of inquiry to determine whether a statutory scheme is reasonably structured to further the goal of adoption without trammeling on parental rights: 1) Is this man the biological father of this child?, and 2) has

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9/ Amicus believes that children have a substantive due process right to a stable home, which is violated by the all-too-frequent phenomenon of indefinite foster care. On the facts of this case, however, it is reasonable to assume that Katie will either remain with the family that has raised her since birth or be returned to her father at some point in the future if circumstances change dramatically. In either case, the difficulties posed by prolonged state custody are substantially diminished here.

he abandoned this child?

As a result of dramatic advances in blood typing, the first question need not detain the Court long. Paternity can now be established with a high degree of certainty. See, Clerk v. Jeter, ___ U.S. ___, 56 USLW 4527 (June 6, 1988).[10/]

Abandonment, or the lack thereof, may prove more subtle and ambiguous, and depends on whether the father has done all that he reasonably could be expected to do, under the facts of the case, to establish and protect a relationship with the child. In some cases, during the pregnancy the father will have offered marriage, financial support, a home for the child, etc., all or some of which the mother may have refused. In the instant

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10/ Indeed in an era of in vitro fertilization and embryo transfer, it may prove difficult to identify a child's "mother" where the egg can be donated by one woman (the genetic mother) and the fetus carried to term by another (the gestational mother).

case, appellant's relationship with Katie's mother was apparently casual and of short duration;[11/] she did not inform him of the pregnancy, and he did not even know of the existence of the child until after she was born.[12/]

Distinctions, of course, are not made between classes of fathers - married, unmarried, type or duration of the relationship with the mother, behavior toward children, etc. when it comes to the obligations of parenthood, such as child support - and rightly so. Such facts cannot, with justice, be held against this father when it comes to the rights of parenthood. Once he knew of Katie's birth, he acted quickly to

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11/ There is no question, however, that he is the father.

12/ This case does not present and, therefore, the Court need not address, the question of the father who is never informed that he has a child, but discovers the fact years later.

establish a relationship with her. It is difficult to imagine what more he could have done. It is the State which acted unconscionably in delaying and prolonging the legal proceedings. Under these circumstances, appellant cannot be said to have abandoned Katie. On the contrary, he has manifested a significant parental interest, and has persistently sought to establish and maintain a relationship with her.

B. This Gender Based Distinction Cannot Be Supported by Any Inherent or Profound Difference Between Mothers and Fathers.

As this Court has noted:

> Natural parental interest [may be] shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children.

Caban, 441 U.S. at 391-92.

There is only one respect in which the interests of mothers and fathers are

profoundly and inherently different, and that issue is not presented here. That one area involves the fundamental right of a woman, in consultation with her physician, to terminate a pregnancy. Roe v. Wade, 410 U.S. 113 (1973). Because the State may not constitutionally interfere with a woman in the exercise of that fundamental right of privacy, this Court has held that the State may not delegate such authority to the woman's husband, Planned Parenthood v. Danforth, 428 U.S. 52 (1976), or necessarily by implication to the "father" of a fetus she is carrying.[13/]

Once the child is born, however, no reason exists, outside of social custom and stereotyped notions of the proper roles for

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[13/] This may at first blush appear to create an inequality in parental rights between mothers and fathers. In fact, it does not. Rather, the Danforth rule creates an equality of rights between men and women to privacy and bodily integrity.

women and men, to support a gender based distinction in parental rights and obligations. It does not serve the needs of women, men, or - most importantly of children - to presume that either gender has a monopoly on nurturance, love, concern, or the willingness to support and care for children. An official presumption that unwed fathers are uninterested, however, can surely help to create or perpetuate such a result. Indeed, the traditional exclusion of fathers from full parental rights has been said to contribute to the anger and resentment of some fathers and to lead, however unjustifiably, to an unwillingness to participate in childrearing when offered the opportunity and to a high rate of deliquency in payment of child support even when court ordered. The latest Census Bureau statistics, for the year 1985, reveal that almost 9 million mothers were heads of

households with children. Only 61 percent of those women had court awards or agreements to receive child support. Of these women, only 48 percent received full payment, 27 percent received partial payment, and 26 percent received no payment. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 152, Child Support and Alimony: 1985 (Advance Data From March-April 1986 Current Population Surveys), U.S. Government Printing Office, Washington, D.C., 1987.

A holding by this Court that unwed fathers do not share equal rights as well as equal responsibilities for their children will send precisely the wrong message to these fathers and may further trap the mothers of these children and the children themselves in the cycles of poverty and dependence in which they all too often find themselves.

CONCLUSION

For the foregoing reasons, this case should be reversed.

Respectfully submitted,

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MOTION FILED
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No. 87-5840

In The
Supreme Court of the United States
October Term, 1987

EDWARD McNAMARA,
Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,
Appellee.

**On Appeal From The Court of Appeal
Of The State Of California
Fourth Appellate District, Division 1**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
MOTION OF AMICUS CURIAE TO DISMISS OR AFFIRM AND
BRIEF AMICUS FOR THE CHILD IN SUPPORT OF APPELLEE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Justices of the Supreme Court of the United States of America.

IT IS RESPECTFULLY REQUESTED that the undersigned Christian R. Van Deusen, Inc., and the individual, be granted leave to file a brief amicus curiae in support of the child and Appellee. This application is based upon the following:

The applicant is licensed to practice before this Supreme Court.

The issues in this case involve the Due Process and Equal Protection rights of a child, her psychological/adoptive parents, the putative father and the biological mother, as well as the State of California's interest in preserving familial relationships. Applicant's practice consists exclusively of adoptions, foster parent adoptions, termination of parental rights, children's rights cases, and associated litigation and appeals.

The firm has cases in trial courts throughout the State of California as well as out of state that involve the issues currently on appeal in this case.

The firm has handled numerous appeals involving children's rights, foster and adoptive parents' rights. The following are published opinions in which the firm was involved:

Adoption of Jennie L. (1980) 111 Cal. App. 3d 422, 168 Cal Rptr. 695.

In re Baby Girl M. (1984) 37 Cal. 3d 65, 207 Cal. Rptr. 309, 688 P. 2d 918.

Michael U. v. Jamie B. (1985) 39 Cal. 3d 787, 218 Cal. Rptr. 39, 705 P. 2d 362.

Christina K. v. Superior Court (1986) 184 Cal. App. 3d 1463, 229 Cal. Rptr. 564.

Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 241 Cal. Rptr. 95.

Adoption of Alexander S. (Mar. 1988) 44 Cal. 3d 857, — Cal. Rptr. —, — P. 2d —.

In total, during the past twelve (12) months this firm has litigated approximately 25 adoption cases in which parental rights were at issue. An equal number were resolved by waiver or default.

The applicant was granted leave to file a brief amicus curiae before the Supreme Court of the State of California in the case of *In re Baby Girl M.*, 37 Cal. 3d 65 (1984), *the same case now before this Honorable Court.*

The firm was recently granted permission by the California Supreme Court to file briefs amicus curiae in case number SOO3804—foster parents' rights and termination of parental rights; and, case number SOO3755—foster parents' rights, children's rights and putative fathers' rights.

The firm also has cases before the 1st District Court of Appeals of the State of California (Humboldt County case numbers 24673 and 3216—termination of parental rights); The Third District Court of Appeals (case number C003203—rights of a putative father); The Fourth District Court of Appeals (case number G006435—termination of parental rights and writ of habeas corpus); The Second District Court of Appeals (case number B026622—termination of parental rights), all of which involve the constitutional issues before the court.

The firm represented Petitioners in the case of *Michael U. v. Jamie B.* (1985), 39 Cal. 3d 787, which case was decided by the Supreme Court of the State of California. This case involved the rights of a putative father and our State Supreme Court has, in that decision failed to address the constitutional rights of the psychological parents v. biological parents and the children involved. The same case was referred to extensively by the lower court given its similarity to this case.

The applicant has frequently been court appointed to represent the best interest of minor children.

The applicant has served five terms on the California State Bar Committee on Adoptions.

The applicant has testified before the California Select Committee on Youth and Children.

The applicant has lectured to the Annual Judges' Family Law Seminar of the California Center for Judicial Education and Research on the subject of Adoptions, Abandonment and Paternity Cases, and authored the Syllabus on those topics.

Because the nature of this applicant's practice and its interest in the issues on appeal, it is uniquely qualified to assist the court by presentation of an amicus curiae brief.

Appellant and Appellee have consented to the filing of the Amicus Curiae brief. Those letters of consent and any others will be filed with the Court forthwith. Letters requesting consent have been sent to all respective counsel.

Such brief is prepared and filed concurrently herewith.

Respectfully submitted,

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**On Appeal From The Court of Appeal
Of The State Of California
Fourth Appellate District, Division 1**

—o—

MOTION OF AMICUS CURIAE TO DISMISS OR AFFIRM

—o—

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Justices of the Supreme Court of the United States of America.

Amicus Curiae herein adopts and incorporates by reference Appellee's Motion to Dismiss or Affirm and further urge the court to dismiss the appeal or, in the alternative, affirm the judgment of the Court of Appeal of the State of California, 4th Appellate District, Division 1.

—o—

OPINIONS BELOW

Amicus Curiae here incorporates by this reference the Statement of Opinions Below made by Appellee in Appellee's Motion To Dismiss or Affirm, filed herein.

———o———

RELEVANT STATUTORY PROVISIONS

Amicus Curiae here seeks to give some insight into the historical background of the statutory scheme and the judicial interpretations below. The evolution of the law reflects the public policy of the State of California and a shift towards focus on the needs of the child.

California has enacted the *Uniform Parentage Act* which sets forth the statutory scheme whereby non-marital fathers may assert their parental rights. In the case of a proposed adoption, the necessity of the putative father's consent will be judicially determined.

From the time of enactment, effective January 1976, appellate courts have applied varying standards in determining the necessity of a putative father's consent to adoption.

One line of cases applied the best interest of the child standard. *In re Marie R.,* (1978) 79 Cal. App. 3d 624, 145 Cal. Rptr. 122, *Cheryl H. v. Superior Court,* (1974) 41 Cal. App. 3d 27, 115 Cal. Rptr. 849, *W.E.J. v. Superior Court,* (1979) 100 Cal. App. 3d 303, 160 Cal. Rptr. 862. A divergent line of reasoning applied the double standard of detriment and best interest of the child as set out in California *Civil Code* § 4600.

On the facts before this court, in 1984 the California Supreme Court in *In re Baby Girl M.* (1984) 37 Cal. 3d 65, ruled that the necessity of a putative father's consent could not be dispensed with absent a showing that it would be *detrimental* to the child to place custody with him.

In 1985 the same court in a strongly divided 5-2 decision applied the detriment standard in *Michael U. v. Jamie B.,* (1985) 39 Cal. 3d 787. Three justices in the majority however strongly urged that *Baby Girl M.* be reversed and that the correct standard is the best interest of the child. (Concurring Kaus J., Mosk J. and Lucas J.).

Both *Baby Girl M.* and *Michael U.* pointed out that unfitness of the father need not be shown, and that detriment could result from the uprooting of the child.

The legislature resolved the issue by amending *Civil Code* § 7006 and § 7017, and effective January 1, 1987, the best interest standard became the exclusive test and the *Civil Code* § 4600 detriment finding no longer applied.

———o———

CONCLUSION

For the foregoing reasons, Amicus Curiae's Motion to Dismiss the appeal herein, or in the alternative to affirm the judgment of the State of California Court of Appeal, Fourth Appellate District, Division One should be granted.

Respectfully submitted,

CHRISTIAN R. VAN DEUSEN, INC.
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TED R. YOUMANS, Esq.
ROBERT R. WALMSLEY, Esq.

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No. 87-5840

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

—o—

**On Appeal From The Court of Appeal
Of The State Of California
Fourth Appellate District, Division 1**

—o—

BRIEF AMICUS CURIAE FOR THE CHILD IN SUPPORT OF APPELLEE

—o—

INTRODUCTION

The guarantee of Equal Protection ensures that no person or class of persons shall be denied the same protection of the laws which is enjoyed by others in like circumstances. *People v. Romo* (1975) 14 Cal. 3d 189, 196, 121 Cal. Rptr. 111, 534 P. 2d 1015. A sovereign may not subject men, women [and children] to disparate treatment where there is no substantial relationship between the classification and an important governmental purpose. *Reed v. Reed* (1971) 404 U.S. 71, 76, 30 L. Ed. 2d 225, 229, 92 S. Ct. 251; *Craig v. Boren* (1976) 429 U.S. 190, 197,

50 L. Ed. 2d 397, 407, 97 S. Ct. 451. In proceedings concerning termination of parental rights and contested adoptions, the courts are invariably confronted with several, and often inconsistent, interests.

One federal court has concisely identified these interests as follows: "the liberty and privacy interests afforded to the parents, the interests of the state, as parens patriae, in protecting children from harm, and finally, the often silent interests of the child. *Sims v. State Dept. of Public Welfare, etc.* (S.D. Tex. 1977) 438 F. Supp. 1179, 1191."

For the sound policies outlined herein courts must recognize the interest of the child. In the adoption arena, many scenarios can arise which throw the adoption into litigation. Those scenarios include: where a biological mother and her *husband* contest the adoption before the adoption is final; a biological mother contests the adoption, but the unmarried biological father ("putative father") does not contest and signs a waiver of his rights; the biological mother consents to the adoption but the putative father contests the adoption (as in the case at bar). These circumstances can be complicated depending on whether the adoption is an agency adoption (the parties work through the state) or a private adoption (the parties work through private attorneys with the state doing the investigation recommending or denying the adoption).

In all, these scenarios involve a high degree of emotion, including ambivalence by the biological parents at times, vengeance between the biological parents due to a love loss or other problems. While the parties and the courts straighten out these predicaments the child is going through his or her most crucial developmental period in his or her life, requiring the utmost of fidelity and care by the court to provide continuity, love and to aid the

child in building support, trust and strength. The child is the most innocent party.

There is no question the courts must also recognize the interests of everyone. Over the passage of time, however, the courts and legislature of the State of California have come to realize and now direct that of all parties involved, the child's interests are paramount. Amicus Curiae respectfully urges this court to send that message with vigor to the various states.

I

THE COURT MUST AFFIRM THE LOWER COURT'S JUDGMENT IN ORDER TO PROTECT THE PARTIES' RIGHTS TO EQUAL PROTECTION AND DUE PROCESS, ESPECIALLY THOSE OF THE CHILD'S

A. The Child Deserves The Fullest Protection By The Court

Between the child, biological mother, putative father, and adoptive parents, the child must be given the greatest rights and protection. The child is the most innocent and vulnerable party who stands to lose the most. A child's right to Equal Protection and Due Process under the United States and California Constitutions would be violated if the lower court were not affirmed.

Appellant is before this Court stating it is a denial of his right to Equal Protection to terminate his rights as a putative father *solely* on a finding it is in the best interest of the child. (Appellants' Jurisdictional Statement at pp. i and 8). Although the California Court of Appeals affirmed the trial court's judgment *which was based on severe detriment* to the child (see *In re Baby Girl M.* (1987) 191 Cal. App. 3d 786, at p. 790), even the required finding of detriment subjected the child, Katie, to a standard that invidiously discriminates against her. It violates Katie's right to Equal Protection to apply

a standard that says she cannot remain in a stable, loving, secure home that would be in her best interests because it cannot be shown that it would be *detrimental* to her to be placed with the putative father.

1. The lower court's decision, although applying the detriment standard, substantially protected the child's right to Equal Protection.

Any contention by Appellant that the public policy of the State of California is to apply a detriment or unfitness standard before terminating the rights of a putative father is fallacious and cannot be supported. In fact, justices of the same Supreme Court that issued the *In re Baby Girl M.* (1984) 37 Cal. 3d 65, 207 Cal. Rptr. 309, 688 P. 2d 918, decision (entitling a putative father to a preference under the terms of California *Civil Code* § 4600 and applying the "detriment" standard) strongly criticized themselves for applying the detriment instead of the "best interests of the child" standard. In their concurring opinions in *Michael U. v. Jamie B.* (1985) 39 Cal. 3d 787, 218 Cal. Rptr. 39, 705 P. 2d 362, they stated:

> "The more I think about it, the more certain I am that the trouble with this case is not so much the fact finding process, but the court's unfortunate misstep in *In re Baby Girl M.* . . . The sooner we rectify that mistake the better."

Id. at pp. 796-97 (Kaus, J. concurring).

> "While the majority managed to save this child by invoking a theory of abuse of trial court discretion, under these egregious circumstances that result is merely palliative. We should reconsider the *Baby Girl M.* decision before it does any more potential damage to the welfare of children and to the previously accepted orderly process of adoption. *We should return to the traditional rule: When there is an unmarried mother who proposes to place her child for adoption and a biological but not [marital,] father [objects,] the trial court should consider only the best interests of the child.*"

Id. at p. 797 (Mosk J., Lucas J. concurring). Emphasis added).

Moreover, the California legislature also responded to the Supreme Court's *Baby Girl M.* decision by amending the statute at issue today, California *Civil Code* § 7017. *Civil Code* § 7017(d)(2) now states, in pertinent part:

> "If . . . [a putative father] . . . claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the *best interest of the child* that [he] retain his parental rights or that adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence. . . . If the court finds that it is in the *best interest of the child* that the father should be allowed to retain his parental right, it shall order that his consent is necessary for an adoption. If [the putative father] is not the father, or that . . . it is in the *child's best interest* that an adoption be allowed to proceed, [the court] shall order that [the putative father's] consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. *Section 4600 [parental preference and detriment standard] does not apply to this proceeding.*" (Emphasis added).

By its language, the legislature specifically overruled *Baby Girl M.* by stating *Civil Code* § 4600 does ont apply. Therefore, although "detriment" was the law of this case below, it cannot be contended that California's policy was supportive of that standard.

Even if appellant's position warrants analyzing the lower court's decision in a "detriment vacuum" detriment may be found exclusively on the basis that it would be emotionally and psychologically harmful to uproot a child from a stable caring loving home of psychological parents whom the child only knows as parents. *In re Reyna* (1976)

55 Cal. App. 3d 288, 302, 126 Cal. Rptr. 138; *Michael U. v. Jamie B., supra*, 39 Cal. 3d at p. 795 and at fn. 7.

Other examples of California's policy to apply the best interests of the child standard are: the passage of *Civil Code* § 232.5 (requiring that in actions to terminate parental rights, the chapter shall be liberally construed to serve and protect the interests and welfare of the child); enactment of *Civil Code* § 232.6 (in actions to terminate parental rights this chapter is to serve the welfare and best interests of a child by providing the stability and security of an adoptive home); amendment to *Civil Code* § 7006 (requiring the court to consolidate a paternity action filed by a putative father with a 7017(d)(2) petition filed by adoptive parents, applying the best interests standard).

A poignant example of even a nationwide concern for recognizing a child's *equal* rights to those of their parents is in California's adoption of the *Uniform Parentage Act* (Civ. Code, § 7000 et seq., added by Stats. 1975, ch. 1244, § 11, pp. 3196-3204). In *Michelle W. v. Ronald W.*, (1985) 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88, the California Supreme Court states, in pertinent part:

> ". . . The act, approved in 1973 by the National Conference of Commissioners on Uniform State Laws (see Uniform Parentage Act, Comrs. Prefatory Note, 9A U.L.A. (Master Ed. 1979) pp. 579-582), "makes a revolutionary change in the law by abolishing the incidents of illegitimacy and *establishing legal equality of children without regard to the marital status of their parents.*" (6 Witkin, Summary of Cal. Law (8th ed., 1984 supp.) Parent and Child, § 242A, p. 326)."

Id. at 362,fn.5. (Emphasis added).

The *Uniform Parentage Act*, *Civil Code* §7002 assures equality where that section states:

> "The parent and child relationship extends *equally* to every child and to every parent, regardless of the marital status of the parents." (Emphasis added).

The detriment standard was correctly applied by the lower court and properly supported. Although "detriment" was the law of the case, the California courts and legislature do not support such a standard. In fact, Appellant was given a greater right, by application of that standard in the lower court than he would receive today. Public policy demands recognition of the child's best interests.

2. The lower court's decision substantially protected the child's right to Due Process.

The judgment from which Appellant appeals was issued in early 1987. At that time Katie was 5½ years old. On remand from the California Supreme Court, the trial court found that Katie would suffer extreme psychological and emotional harm if she were removed from the adoptive home. The Appellate Court's affirmance of that judgment protects her right to Due Process, recognizing her fundamental interests, and is amply supported by the several books, studies and research in the area of early childhood development.

The book, *Beyond the Best Interests of the Child*, has become a standard reference in this area of the law, being cited in *Michael U. v. Jamie B., supra*, 39 Cal. 3d at 787-795; *In re Angelia P.* (1981) 28 Cal. 3d at 908-917, 171 Cal. Rptr. 637, 623 P. 2d 198; *Adoption of Michelle T.* (1975) 44 Cal. App. 3d 699 at 706, 117 Cal. Rptr. 856; *Williams v. Neumann* (Ky. App. 1966) 405 S.W. 2d 556 at 557; and, *Michelle W. v. Ronald W., supra*, 39 Cal. 3d 354 at 363, which list is not inclusive. The authors distinguish between biological and psycological parents, stating:

> "[F]or the child, the physical realities of [her] conception and birth are not the direct cause of [her] emotional attachment. This attachment results from day-to-day attention to [her] needs for physical care, nourishment, comfort, affection and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become [her] 'psychological' parent in whose care the child can feel valued and 'wanted'. An absent biological parent will remain or tend to become a stranger."

Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973) p. 17.

Further, the authors state:

> "Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. For the biological parents, the facts of having engendered, borne, and given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of events leading to their births."

Beyond the Best Interests of the Child (1973) p. 12.

The extent of personality and value structure development in children during the first six years of life is highly significant. (See generally e.g., *Developmental Psychological Today* (1971) ch. 13, pp. 225, 236.). "Attachment disorders" of infants are caused by "absence, disruption, or distortion of normally occurring development sequences of attachment behaviors that serve to orient and anchor the infant to [her] caretakers and provide for [her] a means by which to make an active adaptation to the wider social environment." (Kaplan, Freedman, and Sadock, *Comprehensive Textbook of Psychiatry/III, Volume 3, Third Edition*, p. 2587.

Trauma induced by separation in early childhood development leads to attachment disorders classified as:

> "primary attachment failure in early infancy," "attachment disorder of infancy, anaclitic type," and "attachment disorder of infancy, symbiotic type." These disorders include poverty of play, failure to progress in normal psycho social and intellectual development, regression in language and toileting functions, turning away from others, rocking, head banging, a predilection toward physical illness, accidents, self-injury, nutritional defects, excessive sleep, autonomatic instability, a weakening of the immunological system, and regressive behavior leading to deficiencies in adolescense and adulthood. (*Comprehensive Textbook of Psychiatry/III*, pp. 2589-2593).

If the Lower court removed Katie from her adoptive home, Katie would have suffered these anomolies. This action would have denied her Due Process. Surely, it would now devastate Katie to be removed from her psychological parents.

A child involuntarily separated from its mother or primary caretaker for either a brief or a prolonged interval demonstrates a fairly characteristic affective response, including an initial period of agitation and protest that is followed by despair. (Bowlby, J. *Childhood Mourning and Its Implications for Society* (1961) *American Journal of Psychiatry*, 118, 481-498). In fact, that loss has been found to lead to several immunological consequences and health implications. In an article by Laudenslager and Reite entitled *Losses and Separations—immunological Consequences And Health Implications*, the authors state "there is an extensive literature supporting the hypothesis that losses and separations are significant antecedents to increased mortality. Jacobs & Ostfeld, 1977; Kraus & Lilienfeld, 1959, and also indicating that major life stressors are associated with increased illness Rabkin & Struening, 1976; Rahe & Arthur, 1978. The health problems

range from the common cold to life-threatening cancer or even AIDS." Laudenslager and Reite (1984) *Losses and Separations—Immunological Consequences And Health Implications. Review of Personality and Social Psychology, vol. 5* P. Shaver (ed., pp. 285-290).

Lastly, in a compelling document prepared for ABC's Hour Magazine, entitled *High Risk . . . Children Without A Conscience,* Dr. Ken Magid and Carole A. McKelvey state "it is about babies, parenting, genetics and crime and how they are vitally connected." They go on to state:

> " . . . The answers start at the beginning of life, when the scales are tipped, either toward a future of trust and love, or mistrust and deep-seeded rage.
>
> The critical factor is bonding. Without correct bonding the infant will become unattached to his or her primary caretaker, the mother and/or father. A growing number of experts now believe that this stage in a baby's development has much greater significance than previously believed.
>
> . . .
>
> . . . A revolution is happening which may result in future generations of detached children. . . . The key to prevention is knowledge—a complete understanding of how healthy babies grow emotionally.
>
> The tragedy of unattachment will not go away. But violence does not have to be woven into the fabric of American life. It is our sincere desire that this book will shed light on why some individuals are anti social and what may be done to prevent damage to infants."

Id. at pp. i-ii.

The work draws a significant nexus between early childhood disruption of attachments and juvenile delinquency, crime, viciousness, unreliability, scattered work histories, sexual intercourse with numerous partners without becoming attached or intimate, persistent lying, failing to identify with spiritual thoughts, an obsession for control, no response to love and empathy, harboring resentments and devious natures. For these characteristics, Dr. Magid and McKelvey cite to Dr. Foster Kline, an authority on unattached children whose Institute for Human Behavior, located in Evergreen, California, has spent a lifetime diagnosing and treating children with attachment problems. (*Id.* at pp. 2-3).

There is strong authority by the California Supreme Court supporting recognition of the child's right to Due Process and the child's liberty interests in maintaining a safe, continuous, secure, loving and stable home. This court has similarly recognized the same. As recent as March 1988, California Supreme Court in *Adoption of Alexander S.* (1988) 44 Cal. 3d 857, — Cal. Rptr. —, — P. 2d —, stated "protracted litigation over the custody of a child may harm the child." (*Id.* at p. 868). The court went on to state:

> ". . . it is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether [she] is to remain in [her] current 'home', under the care of [her] parents or foster parents, especially when such uncertainty is prolonged."

Id. at p. 868. For the above proposition, the California Supreme Court cited this Court's decision in *Lehman v. Lycoming County Children's Services, supra* (1982) 458 U.S. 502, 513-14, 73 L.Ed.2d 928, 102 S.Ct. 3231.

In a strong concurring opinion issued February 10, 1988 by the Honorable Justice Brauer of the California Sixth Appellate District in *In re Micah S.* (1988) 198 Cal. App. 3d 557, 243 Cal. Rptr. 756, Justice Brauer states:

> ". . . And it is no longer open to question that the child's best interest must be paramount . . . . The legislature's awareness of the harmful effect of delay is patent . . .

> But it is clear that the balancing process which inheres in any Due Process analysis, the pendulum must swing further away from preoccupation with parents' rights and toward the protection of the waifs. It cannot be doubted that the legislature's well-meaning pronouncements in favor of the child's best interests and speedy adjudication have been palliatives at best. . . . I have no doubt that the most serious bottleneck is the appeal, and that the plight of children in limbo cannot be ameliorated unless means are found to discourage the taking of appeals. . . . [S]omething must be done to afford these small human beings some change for growth and a glimmer of future happiness."

In re Micah S., supra, 198 Cal. App. 3d at pp. 564-568.

B. The State Has A Substantial Interest In Upholding The Integrity of A Familial Relationship.

In *Lehman v. Lycoming County Children's Services, supra*, 458 U.S. 502 at 513, this court stated "[t]he State's interest in finality is unusually strong in child-custody disputes."

In *Quilloin v. Walcott* (1977) 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549, this court stated:

> "Rather the result of the adoption in this case was to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'"

Id. at p. 255 (quoting from *Smith v. Organization of Foster Families For Equality and Reform* (1976) 431 U.S. 816 at p. 683, concurring opinion by Stewart, J.)

The integrity of the familial relationship is strongly recognized in California. In *Michelle W. v. Ronald W., supra*, 39 Cal. 3d 354, the California Supreme Court stated:

> "We turn to the interests of the state. . . . including certain social policies upholding the integrity of the family (*Kusior v. Silver* (1960) 54 Cal. 2d 603, . . ., and protecting the child's welfare (*In re Lisa R., supra*, 13 Cal. 3d at pp. 649-650). . . . The interests noted above apply to the facts of the case at bench. Here, [the Putative father's] private interests in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child."

Id. at pp. 362-363. In other words, the private interest yielded to the state's interest.

The court in *Kusior, supra*, stated, "There are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned." *Kusior v. Silver, supra*, 54 Cal. 2d at p. 619. Although Appellant is not a marital father in the case at bar, the *Kusior* court simply states that where a familial relationship exists the state has a significant interest in sustaining it. The lower court here found a "familial relationship" as existing between the adoptive/psychological parents and the child, Katie. Given the fact Appellant brings this appeal clearly after that relationship nurtured and formed, Amicus Curiae respectfully urges this Court find the state's interest in protecting that family outweighs the private interest of Appellant.

Further the California Supreme Court stated in *In re Angelia P.* (1981) 28 Cal. 3d 908, 171 Cal. Rptr. 673, 623 P. 2d 198:

> "We have recently acknowledged that 'Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible to parenthood.' . . . Nonetheless, parental rights are not absolute and we must seek a consistent and reasonable approach to the varying rights involved when the state, by intervention, disturbs natural familial relationship."

Id. at p. 916.

The courts have most recently recognized the significant interest of the state in upholding the integrity of the family in *John Roe v. Superior Court of the State of California, County of Marin,* (1988) 88 Daily Journal D.A.R. 8049 and in *Michael H. v. Gerald D.* (1987) 191 Cal. App. 3d 995, 236 Cal. Rptr. 810.[1]

C. The Father's Statutory And Constitutionally Recognized Rights Were Protected.

The Equal Protection Clause of the United States Constitution does not mandate that all biological fathers be afforded the equivalent rights of the biological mother or child. The mere existence of a biological link does not merit equivalent protection. *Lehr v. Robertson* (1983) 463 U.S. 248, 266, 77 L. Ed. 2d 614, 103 S. Ct. 2985. There are certain fathers, generally distinguished by statute, which, due to their conduct and expressions, are elevated to a level whereby their rights are equal to that of a natural mother. *Caban v. Mohammed* (1979) 441 U.S. 380, 392, 393. California has enacted statutory provisions stating marital fathers are afforded equivalent protections as a mother—referring to them as "presumed fathers." (California *Civil Code* § 197 and § 7004). Biological fathers not embraced within the statutory provisions of California *Civil Code* § 7004 are referred to as "putative fathers." Their rights are set forth within the statutory provisions of California *Civil Code* § 7017(d).

A putative father falling within the ambit of 7017(d) is entitled to notice of any adoption proceeding and a right to be heard if he objects. (California *Civil Code* § 7017(d) and (f).) During the proceedings below the court was re-

[1] Amicus Curiae notes in *Roe v. Superior Court of the State of California, County of Marin,* fn. 2 that the United States Supreme Court granted review of *Michael H. v. Gerald D.* on February 20, 1988.

quired to find that it was/was not detrimental[2] to the child to remove her from her adoptive home and placed with the biological father. Such statutory requirements substantially protected the biological father's rights to Due Process and Equal Protection while, most importantly, protecting the child's best interests.

1. The rights afforded Appellant as a putative father, comport with the United States Constitution and decisions of this Court.

In *Stanley v. Illinois* (1972) 405 U.S. 45, 31 L. Ed. 2d 551, 92 S. Ct. 1208, the father and mother had never married, but had lived together intermittently, and he had held out the children as his own, making him a presumed/legitimate father with a familial relationship. After the mother's death, the state took the children into their custody. This court held that due process and equal protection required that a state give notice to a natural father and provide a hearing on his fitness before the children could be taken from his care and custody. The California law at the time of this action met that requirement. In a proceeding to terminate parental control, a citation must be served on the parents and they are entitled to appear, at the states expense, with court appointed counsel. California *Civil Code* § 235, 237.5.

In *Quilloin v. Walcott* (1978) 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549, the child was born to a couple which had never been married nor had ever established a home together. The mother subsequently married the adopting petitioner, Walcott, who petitioned to adopt the child with the mother's consent. The trial court overruled the father's objection to the adoption based upon the Georgia

[2] Amicus Curiae notes while the detriment standard was applicable during the proceedings below, *In re Baby Girl, M,* 37 Cal. 3d 65, such standard is no longer applicable, (California *Civil Code* Section 7017(d)(2)).

statute which denied the unwed father power to veto the adoption. This court held the Georgia statute was constitutional as applied.

Quilloin sets forth the principle that a father whose relationship to the child is only biological may be treated differently from a father who has established a family relationship with the child and mother. This principle was reiterated by this court in *Parham v. Hughes* (1979) 441 U.S. 347, 60 L. Ed. 2d 269, 99 S. Ct. 174, wherein this court again upheld a statute denying a father's illegitimate children the right to recover damages for the wrongful death of the children, although such recovery was allowed to all fathers who legitimated their children and all mothers.

In contrast this court struck down a gender based statute in *Caban v. Mohammed* (1979) 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760. In *Caban* the unmarried parents *had lived together for five years as husband and wife* and during this period two children were born, obviously making the father a presumed/legitimate father who had firmly established a familial relationship. The parents subsequently separated and the mother married the adopting petitioner, Mohammed. Mohammed thereafter sought to adopt the children with only the mother's consent. The father, Caban, had also remarried. He and his new wife also filed a petition for adoption. The applicable New York law set forth that an unwed mother could veto an adoption, but an unwed father could not. Based upon this statute, the trial court granted the adoption petition of the Mohammeds. This court reversed on the ground that the gender based distinction in the state law was unconstitutional. This court found that the New York statute created an overbroad gender-based discrimination between all unmarried fathers and all unmarried mothers.

Caban illustrated the injustice created by the statute in discriminating between parents who had lived as a family for years. However, under California law, *Caban* would have been classified as a presumed father, thus entitled to veto any proposed adoption under California *Civil Code* Sections 224 and 7017(d).

The California statute, 7017(d), avoids the fault of discriminating between all unwed mothers and all unwed fathers.

> "The statutory classification sets apart those biological fathers who have neither gone through an apparently valid marriage ceremony with the mother nor lived with the child as a parent."

W.E.J. v. Superior Court (1979) 100 Cal. App. 3d 303, 314, 160 Cal. Rptr. 862. As further recognized in *W.E.J.*:

> "Those biological fathers who were denied the veto power are easily distinguishable from those who hold the power. Members of this class have neither expressed the interest which is implied in the marriage ceremony nor undertaken the care of the child in the common home. The legislature was not unreasonable in concluding that that class will contain a substantial portion of fathers who are strangers to the child and whose objection to adoption will be based upon something other than a mature consideration of the child's best interests. *The protection of the child is well recognized as an important state interest.*
>
> To the extent that this classification is based upon gender, it is based upon an actual difference in situation. Whatever else may be said of an unwed mother, she is no stranger to her child. A gender-based classification is not improper where a man and woman are not similarly situated. (See *Schlesinger v. Ballard*, 419 U.S. 498 [42 L. Ed. 2d 610, 95 Supreme Court 572])." *Id.* at 314-315. [emphasis added].

Each of the authorities cited serve to illustrate the important principle that both the state and the child's interest serve a substantial interest in distinguishing be-

tween a presumed father and a putative father. (See *Lehr v. Robertson*, 463 U.S. at 265-267; *Quilloin v. Walcott*, 434 U.S. at 252; *W.E.J. v. Superior Court*, 100 Cal. App. at 315). Certainly states could enact statutes entitling all fathers, presumed or putative, to equivalent rights. Such rights due to constitutional mandate would include the power to veto an adoption. *Caban v. Mohammed, supra*, 441 U.S. at 389. However, such a statutory scheme would not ensure promptness, finality, and promotion of the child's best interest and would be contrary to this court's stated policy. (*Lehr v. Robertson*, 463 U.S. at 265). For these reasons, this Court has recognized the states' ability to distinguish between a presumed father and a putative father. *Id.* at 267.

This does not mean that a putative father is without rights. Under this Court's decisions, in *Stanley v. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246, 1977), and *Lehr v. Robertson*, 463 U.S. 248 (1982) and under the then applicable California statute governing the rights of the putative father, California *Civil Code* § 7017 (d), a putative father is entitled to notice of any and all proceedings concerning legal custody of the child, is entitled to the right to be heard and is entitled to a determination of whether or whether not it would be detrimental to the child to uproot it from its present care and custody as well as what is in the ultimate best interest of the child.

In the present matter, it is clear Appellant is not a presumed father. His rights, therefore, are governed by the statutory provisions of California *Civil Code* § 7017(d). As noted above, § 7017(d) mandates that a putative father be given notice of any proceedings concerning legal custody of the child and provided the right to be heard. Further, a putative father is entitled to proffer evidence

as to why it would be in the child's best interest that custody be with him and/or why it would not be detrimental to the child to change the existing custody arrangements. Appellant was afforded each of the procedural requirements under § 7017(d) and indeed had the opportunity to offer evidence as to the child's best interest and/or any detriment, if any, that may or may not befall this child due to a change in custody. Thus, Appellant's rights under both the Due Process Clause and the Equal Protection Clause have not been violated.

2. A finding of detriment did not require a finding of parental unfitness.

Appellant contends that it was a violation of his right to Equal Protection to terminate his parental rights without a finding he was unfit. (Appellant's jurisdictional statement at pp. 1 and 8). Such a proposition is untenable given this Court's recognition that the child's interests are paramount. *Lehr v. Robertson, supra*, 463 U.S. at 257.

Appellant's proposition, worded another way, would require a finding of parental unfitness, before terminating parental rights, despite a finding the child will incur and suffer devastating detrimental effects due to a change in custody. This proposition virtually ignores any and all rights a child has to be free of the harm caused by uprooting it from a bonded, secure environment. (See *supra*). As pointed out by the California Supreme Court in *In re Angelia P., supra*, 28 Cal. 3d 908:

> "More recently, the primacy of another consideration has evolved in the reasoning of courts, legislatures, and commentators which have focused on the child's well-being, seeking to ascertain the 'best interest' of 'the least detrimental alternative to the child.' Our legislature's concern is manifest in its direction threat

the statutes concerning the termination of parental rights shall be liberally construed to serve and protect the interest and welfare of the child. (Section 232.5: See also Welfare and Institutions Code, subsection 302, 319.5, 328.5, 360-370: Senate Bill number 1726 (Presley 1980) [Statutes establishing and regulating "demonstration" counties involved in innovative approaches to dealing with removal, termination, and foster care for children].)

In theory, the evolving "Parental preference" and "child's best interest" standards do not necessarily conflict. As one commentator has noted 'In general, children's' needs are best met by helping parents achieve their interests. In some situations, however, there may be a conflict of interest . . . in these situations, the legal system should protect the child's interests. Not only is the child a helpless party, but the parents should suffer the consequences of their inadequacy rather than the child.'"

Id. at 916, 917.

Detriment is a term of art involving numerous factors. But this court must keep in mind that the issue is "detriment to the child." Certainly a parent's unfitness is a factor to be considered. However, it need not be found before even a biological mother or presumed father's rights can be terminated. *In re B.G.* (1974) 11 Cal. 3d 679, 694, 695, 144 Cal. Rptr. 444, 523 P. 2d 244. The central focus, while considering parental rights, is that of the child. *In re Angelia P., supra,* 28 Cal. 3d at 917.

Indeed, parental unfitness was expressly found not to be required in a determination of detriment pursuant to proceedings to terminate parental rights. *In re B.G., supra,* 11 Cal. 3d at 697. The *B.G.* court stated:

> "In summary, the parental preference doctrine, as it existed before the enactment of the Family Law Act, embodied both the requirement that a custody order in favor of a non-parent rest upon a finding of parental unfitness, and the limitation that such an order would be made only in extreme cases. The enactment of Section 4600 changes the former principle, and focuses the attention not on the unfitness of the parent, but the detriment to the child. See *Guardianship of Marino,* (1973) 30 Cal. App. 3d 952, 958.)"

Id. at 698. The Court continued, citing the 1966 report of the Governor's Commission on the Family:

> "Explaining this refusal to require that such custody awards rest upon the finding of parental unfitness, the Commission stated that 'We have no intentions of undermining the parents rights to the custody of their children, and we believe that the primacy of those rights must be preserved. We are convinced, however, that no useful purpose can be served by forcing a formalized finding of unfitness. The cases in which a child's best interest will require a custodial award to a third person may be rare, but are nonetheless serious. To take the most common example, if the custodial parent dies and the Court should specifically find that the child's welfare would be best served by awarding custody to the stepparent, with whom the child has been living and with whom he has formed a warm and stable relationship, should not the court be so able to order without having to find a long-absent or minimally-interested parent judicially unfit? We believe that it should.'"

Id. at 697.

Appellant has correctly pointed out that this court elected not to address the issue of whether the state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit. (Appellant's Jurisdictional Statement at p. 8). *Caban v. Mohammed,* (1979) 341 U.S. 380, 394 n. 16. Yet, as set forth above, such a finding of parental unfitness is not a prerequisite to terminating parental rights. A requirement of parental unfitness would effectively ignore the paramount rights of the child.

However, with regard to a putative father, this court has decided the issue of whether unfitness is a requirement before his parental rights can be terminated. In *Quilloin v. Walcott, supra,* 434 U.S. at p. 255, this court found that unfitness of a putative father need not be found before his parental rights could be terminated. In *Quilloin,* the biological father appealed the decision of the Supreme Court of Georgia terminating his parental rights. The biological father argued that he was entitled, as a matter of Due Process and Equal Protection, to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent. This court noted, in affirming the Supreme Court of Georgia:

> "We have little doubt that the due process clause would be offended '[I]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest.'" *Smith v. Organization of Foster Families,* 431 U.S. 816, 862 -863 (1977). (Stewart, J. concurring in judgment.) "But this is not a case in which the unwed father at any time, had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never lived before. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned except appellant. *Whatever might be required in other situations, we cannot say that the state was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interest of the child.'"* [Emphasis added]

Id. at 255.

In the matter at bar, it is clear Appellant is not a presumed father and is not entitled to the entire assemblage of parental rights that a mother ordinarily is afforded. Pursuant to statutory definition, Appellant's status is that of a putative father. His rights are governed by *California Civil Code* § 7017 (d). As such, the court was not compelled, pursuant to the United States Constitution, the decision of this court and applicable California statutes and case law, to make a finding that he was unfit before his parental rights could be terminated. Therefore, the lower court's decision was entirely correct.

D. The Lower Court's Decision Protected The Rights Of The Mother While Also Protecting The Child's Best Interest.

Pursuant to California *Civil Code* § 197, the mother of a child has the exclusive right to custody, unless there is a presumed father. (Formally, legitimation). As discussed *supra,* Appellant herein is a putative father; social policy says his rights are less than a presumed father.

The question presented before the California courts on numerous occasions is whether a mother can prevent the father from becoming a presumed father. The courts have responded with a resounding yes. In *Adoption of Marie R.* (1978) 79 Cal. App. 3d 624, 145 Cal. Rptr. 122, the court stated:

> "Charles here relies on the fact that he has tried to have the child with him in his mother's home but has been frustrated in those attempts by the refusal of the mother to permit him to have the child. That is not sufficient. The cases have recognized that a mother may, by her conduct, prevent a natural father from securing even the minimal contact with a child that the old section required. (*Adoption of Rebecca B.* (1977) 68 Cal. App. 3d 193, 198 [137 Cal. Rptr. 100]; *In re Reyna* (1976) 55 Cal. App. 3d 298, 300 [126 Cal. Rptr. 138].)"

Id. at 603.

For twenty years prior to the decisions in *Marie R.* and *W.E.J. v. Superior Court,* (1979) 100 Cal. App. 3d.

303, 160 Cal. Rptr. 862, the courts have refused to hold that a putative father could legitimate the child against the will of the mother. *Adoption of Irby* (1964) 226 Cal. App. 2d 238; *Adoption of Pierce* (1971) 15 Cal. App. 3d 244; *Truschke v. LaRocca* (1965) 237 Cal. App. 2d 75; *Cheryl H. v. Superior Court* (1974) 41 Cal. App. 3d 273, 277-278; *Guardianship of Smith* (1954) 42 Cal. 2d 91, 98.

Further, the mother does not waive the right to prevent the father from becoming a presumed father by placing the child for adoption:

> "The application of the New Parentage Act classification was before this court in *Adoption of Marie R.* (1978) 79 Cal. App. 3d 64 [145 Cal. Rptr. 122]. That case, as here, the mother had turned over her nonmarital infant to a couple who desired to adopt. A man claiming to be the biological father offered to receive the infant into his home and to provide support, but the mother refused the offer. The father objected to the adoption and contended that, since he had done everything he could do to provide a home for the child, this tender was enough to give him the status of "presumed father", and to exercise the veto which the code gives to a man who is so classified. The trial court accepted that theory and made an order that the adoption not proceed because of the objection of the father. That order was reversed because the father had no veto power. We also considered and upheld the constitutionality of the classification, citing *Quilloin v. Walcott* (1978) 434 U.S. 246 [54 Lawyers Edition 2d 511, 98 Supreme Court 549]. In so deciding we recognized that, with respect to a nonmarital child, the mother may, by her conduct, prevent the male from acquiring the status of "presumed father" which would have given him a veto over adoption. [27 Cal. App. 3d at page 630]"

W.E.J. v. Superior Court, supra, 100 Cal. App. 3d 303 at 310:

The court noted Justice Traynor's comment in *Adoption of Irby,* (1964) 226 Cal. App. 2d 238; 37 Cal. Rptr. 379:

> "This case recognizes that there are two situations in which the father of an illegitimate child cannot legitimate the child even though he is willing to do so. The first situation is where his wife, who is not the mother of the child, refuses to permit him to receive the child into the family circle, and the second is where the natural mother of the child refuses to give up custody of the child thereby preventing him from receiving the child. If either of these consents is lacking, he may not legitimate the child."

Id. at 240.

In *Cheryl H. v. Superior Court* (1974) 41 Cal. App. 3d 273, the court stated:

> "The mother may effectively preclude legitimation where, as here, she refuses to marry the father or relinquish custody of the child to him."

Id. at pp. 277-78.

This court has also found that a state statute which always required the mother's consent to an adoption of the child born out of wedlock, but required the fathers consent *only* if he had legitimated the child, did not violate the equal protection clause. *Lehr v. Robertson, supra,* 463 U.S. at 267. This court also recognized that States may enact legislation which guarantees to certain people the right to veto an adoption and the right to prior notice of any adoption proceeding. *Id.* at 266. The mother of an illegitimate child is always within the favorite class, but only certain putative fathers are included. *Id.* at 266.

The crux of the issue comes down to whether a mother should be precluded from taking steps to actively promote the best interest of the child when an illegitimate father is in existence. The answer should be no.

More often than not, the scenario presented is that a mother has been impregnated by a male and then never hears, or rarely hears, from that person after the damage

is done. The mother never receives maternity or emotional support needed during the troubled period of pregnancy. During and after birth, the mother, recognizing that she is both financially and perhaps emotionally incapable of caring for the child, elects to provide for the child's welfare by placing it in an adoptive home. Often upon learning of the adoption the biological father does nothing. Occasionally however, the biological father will react in the form of protesting the adoption. When this occurs, the mother will invariably opt to fight him for custody. The mother's reaction is due to her having already made a decision as to best interest of the child, i.e., adoption.

The Salient issue is whether the courts must recognize the rights of the mother to act on behalf of the child and avoid "strapping" herself to a perhaps unwanted child rearing or continued relationship with the putative father. In order to prevent this catch-22, the courts must protect the mother's right to place the child for adoption. If the putative father contests, the appropriate time and place for that contest is at a *Civil Code* § 7017 hearing where at the rights of all parties will be preserved, including the adoptive parents' and childs'.

E. Affirmation Of The Lower Court's Judgment Preserves The Adoptive Parent's Rights To Equal Protection And Due Process.

In many ways the state's interest in promoting adoption and the child's right to maintain a safe, continuous, loving home intertwine with the rights of the adoptive parents. The Honorable Justice Stevens' dissenting opinion in *Caban v. Mohammed, supra*, 441 U.S. 380, states: "the interest in facilitating adoption in appropriate cases is strong—perhaps even "'compelling'". *Id.* at p. 402. This interest is codified in California at *Civil Code* § 232.6, *supra*, where it states "the purpose of this chapter is to serve

the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing".

The rights of non-biological, or "psychological parents" received clear constitutional protection in 1973. In *C.V.C. v. Superior Court*, (1973) 29 Cal. App. 3d 909, 106 Cal. Rptr. 123, the court heard an adoptive couples' appeal when their child was removed without a hearing by the agency, one year after being placed with them. The court then held that:

> "the Fourteenth Amendments' guarantee of due process of law requires notice and opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest . . . In determining whether a status or right is fundamental, the courts consider its effect in human terms and its importance to the individuals' life situation. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 144 [93 Cal. Rptr. 234, 481 P. 2d 242].)
>
> Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the closest conceivable counterpart of the relationship of parent and child.' (*Adoption of Barnett* (1960) 54 Cal. 2d 370, 377). To characterize enforced removal of the child as a 'grievous loss' is to state the obvious."

C.V.C. v. Superior Court, supra, 29 Cal. App. 3d at p. 916.

Although the notion that "blood is thicker than water" is still prevalent, Justice Friedman in footnote 7 makes this revealing observation:

> Is [biological parenthood] more natural or more important than the mutual, reciprocal and continuous

relationship between parent and child, which may occur in adoptive or non-adoptive families, involved in the rearing of a child from infancy to maturity with all of the impact of day-to-day care and upbringing upon character, psychology, outlook, emotional make-up, and even biology which that entails? In this sense, does not nurture 'do the work of nature' and create one a child who by nature is a stranger? In fact, in this sense, does not nature do the work of nature and create one a child who by nature is not a stranger? (TenBrock, *California's Adoption Law and Programs* 6 Hastings L.J. 261, 276 (1955).

Once the standards of constitutional protection are brought into play, the parties must be treated equally. Indeed, to impose upon one type of parent a stricter standard or heavier burden of proof violates the 14th Amendment. Appellant is asking this court to impose a burden on the adoptive parents and child to prove that it would be detrimental to the child if the child were placed in his custody. Such burden is not applied to him and therefore a patent inequality exists. This theme of equality has existed for many years in California. In *Adoption of Barnett* (1960) 54 Cal. 2d 370, 6 Cal. Rptr. 562, 354 P. 2d 18, the California Supreme Court held:

> The rule of strict construction of our adoption statutes in favor of the natural parents . . ., [is] inconsistent with the decisions of this court . . ., as well as with *Civil Code Section* 4, [and therefore] is disapproved.

Id. at p. 378.

The courts have strengthened their view recently. The court in *Adoption of Duckett* (1975) 48 Cal. App. 3d 244, 121 Cal. Rptr. 574, citing *San Diego County Department of Public Welfare v. Superior Court* (1972) 7 Cal. 3d 1, 101 Cal. Rptr. 541, 496 P. 2d 453, stated that:

> The requirement of consent by a natural parent is not strictly construed in favor of the rights of the natural parent, but *instead is liberally construed in order to effect the objection of the adoption statute in promoting the welfare of the children.*" (Emphasis added)

Adoption of Duckett (1975) 48 Cal. App. 3d at p. 248.

Surely, given the time, emotion, love and perseverance the adoptive parents have demonstrated they cannot be denied recognition of a substantial right both in the outcome of this litigation and to maintain a continuous relationship with the child, Katie, who knows only them as her parents.

Further, to decide the future of a child, and the custodial placement in which the child will be forced to live, without consideration of the child's best interest, is a violation of Due Process and Equal Protection.

State intervention into enumerated or implied rights in the United States Constitution has been held to trigger a strict scrutiny of the statutes involved to insure that they do not violate the Equal Protection Clause of the Fourteenth Amendment. *Shelly v. Kramer*, (1948) 334 U.S. 1; *Griswold v. Connecticut*, (1965) 381 U.S. 479. For this reason, courts must be prohibited from lightly disregarding the rights of the adoptive parents and the child.

CONCLUSION

This case, as decided by the lower court, represents the changing trend recognizing the child's interests. It effectly denounces the archaic notion that children are mere chattel for which biological parents hold the deed. Children are people too. They also have fundamental interests and due to their vulnerability, their interest must be afforded the greatest protection. The lower court indeed

recognized this and ruled accordingly. For this reason and the foregoing Amicus Curiae strongly urges this court to affirm the decision of the lower court.

DATED: July 5, 1988

Respectfully submitted,

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No. 87-5840

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD MCNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES,

Appellee.

On Appeal from the Court of Appeal of the State of California Fourth Appellate District, Division One

BRIEF AMICUS CURIAE FOR THE BARKER FOUNDATION IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether an unwed, noncustodial father is entitled to custody of (or visitation rights with) a seven-year old child to whom he is effectively a stranger, where the child has adjusted happily to the parenting of an adoptive couple with whom she has lived her entire life and where a trial court has found that reunification of the father and child would cause the child "extreme emotional and psychological harm"?

2. Whether, under the Equal Protection Clause, an unwed, noncustodial father has an absolute right to "veto" the adoption of his newborn child simply because mothers and presumed fathers have such veto rights?

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BRIEF AMICUS CURIAE FOR THE BARKER FOUNDATION IN SUPPORT OF APPELLEE

This brief is filed on behalf of the Barker Foundation in support of Appellee.[1]

INTEREST OF THE AMICUS CURIAE

The Barker Foundation is a private, nonprofit adoption agency, licensed in the District of Columbia and Virginia, which has arranged over 3500 adoptions over a forty-three year period. In recent years, Barker has placed approximately seventy children each year.

In Barker's view, Appellant's claims for relief gravely threaten the continuing viability of the adoption process.

---

[1] Consents from counsel for all parties have been filed with the Clerk of the Court.

If acceded to, they will make adoption of illegitimate children virtually unworkable, cast into doubt the validity of existing adoptive relationships, dissuade potential adoptive parents from pursuing the adoption alternative, and leave thousands of adoptable children in institutions or the limbo of foster care. As an organization with a philanthropic viewpoint, and a first-hand knowledge of the benefits (and real-world impediments to) adoption, Barker has no interest in the vindication of California law except to the extent that it establishes a fair and workable framework for adoption.

THE STATUTORY SCHEME

Modelled on the Uniform Parentage Act,[2] the 1981 California statutory scheme governing parental rights, child custody and adoption may be summarized as follows.

The legal relationship of parent and child in California expressly extends "equally to every child and to every parent, regardless of the marital status of the parents." Cal. Civil Code §§ 7001, 7002 (West 1983). A mother and child relationship is established either by "proof of her having given birth to the child," or in an action brought by "any interested party." Cal. Civil Code §§ 7003, 7015 (West 1983). The father and child relationship, in turn, can be established in a filiation proceeding, except that certain men (i.e., each father who either (i) has had legal custody as a result of an actual or attempted marriage, or (ii) "receives the child into his home and openly holds out the child as his natural child") are rebuttably presumed to be fathers ("presumed fathers"). Cal. Civil Code §§ 197 (West 1982), 7004, 7006 (West 1983). Other fathers are referred to herein as "putative" fathers.

---

[2] The Uniform Parentage Act has been enacted in seventeen states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington and Wyoming.

Section 4600 of the California Civil Code sets forth the custodial rights of parents and third parties. Without distinguishing between presumed and putative fathers, Section 4600 establishes a preference for parents in awarding custody, and further provides:

> (c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child . . . .

Thus, Section 4600 assumes that custody is an important but not absolute right of a parent, sets a standard for changing custody over the objection of the parent, and identifies the best interests of the child as an important State interest.

The California adoption provisions reflect the policy judgments implicit in Section 4600 and the need to make the adoption process prompt and final. Specifically, parents who have had actual or legal custody (i.e., the child's mother and "presumed" father) must consent before the adoption alternative is pursued. Cal. Civil Code §§ 197, 224 (West 1982); Cal. Civil Code §§ 7004, 7017 (West 1983). Consent, once filed, can be withdrawn by either mutual agreement of the adoption agency and the relinquishing parent(s), or by a judicial finding that "withdrawal of the consent to adoption is reasonable in view of all the circumstances and that withdrawal of the consent would be for the best interests of the child." Cal. Civil Code §§ 224m, 226a (West 1982).

Although California does not permit putative fathers like Mr. McNamara to "veto" an adoption, such fathers (if identified during the statutorily-mandated inquiry which follows the filing of the biological mother's consent to adoption) are automatically entitled to receive

notice and a hearing on parentage (presumed or putative) and custodial rights *before* actual adoption proceedings can be instituted. Cal. Civil Code § 7017. If a Section 7017 hearing results in an "order . . . dispensing with a father's consent for the adoption of a child," it "may be appealed from" in accordance with procedures providing for highest priority on appellate dockets.[3] Cal. Civil Code § 7017(g); Cal. Civil and Criminal Rules 39(e) (West 1981 and Supp. 1987). In addition, under California Civil Code § 7006 (West 1983), the putative father had the power and right to stay a Section 7017 proceeding to terminate his parental rights by filing a filiation proceeding.

STATEMENT[4]

Katie M., born July 18, 1981, was conceived during the latter part of a casual, nonmarital three-month relationship. Following termination of the affair in November, 1980, and throughout the pregnancy, her biological father, Appellant McNamara, "had talked to [Katie's mother] maybe once on the phone and saw her for like ten minutes." 1981 Tr. 29. McNamara was not told that a child was due.

While in the hospital, Katie's mother indicated a strong interest in adoption. She received counselling and selected (from among profiles offered by a social worker) a two-parent family with whom she wished her daughter

[3] Throughout the years of this case, McNamara never exercised this right to request an expedited appeal. Had he acted, the amount of time that this case has spent on appellate calendars likely would have been substantially less.

[4] The transcript of the December 18, 1981 hearing on the County's petition to terminate McNamara's rights will be cited as "1981 Tr. ——." The transcripts of the February 25-26 and February 27, 1985 hearing on remand will be cited as "2/25/1985 Tr. ——" and "2/27/1985 Tr. ——," respectively.

to be placed. Katie was placed with foster parents on July 21, 1981, and with the adoptive parents selected by her mother on August 24, 1981. She has lived with her adoptive parents and her "brother," Joshua, continuously since then—for seven full years—becoming completely integrated into the family and a happy, healthy child. J. App. 22-25.

On August 1, 1981, Katie's mother told McNamara of the birth and asked that he consent to the adoption. McNamara then met with the County social worker on August 5, informing her that he would not accept custody. He met with the social worker again on August 10; during that second meeting, she explained that he could file a filiation proceeding or wait for the County to bring a Section 7017 hearing to terminate his parental rights. 1981 Tr. 13, 30, 31. Although McNamara realized that Katie's mother intended to relinquish Katie for adoption with the express understanding that the child would be placed with a couple whom neither biological parent knew, he told the social worker that he would wait for the termination proceeding, and—when asked whether he had changed his mind about accepting custody—replied only that he did not know what would serve the best interests of his child. *Id.*, at 14, 31. On the same day, the County filed a petition under Section 7017 seeking to terminate McNamara's parental rights.

Honoring requests by McNamara, the social worker arranged for him to visit Katie on August 17 and November 3, 1981. 1981 Tr. 15. By mutual agreement, each meeting lasted half an hour to 45 minutes. 1981 Tr. 33. After the August 17th meeting, McNamara said—for the first time—that he wanted custody. The social worker believed that McNamara's request came too late, since the child had already been removed from the biological mother's custody. 1981 Tr. 15-17, 19-20.

THE PROCEEDINGS BELOW

The Section 7017 hearing on the County's petition to terminate McNamara's rights was held in December 1981. The County called two experienced social workers who had extensive knowledge about the adoptive family and the quality of their home life. They testified that the infant had developed strong emotional ties to the adoptive mother, that "bonding" had already occurred, and that the family provided an excellent, loving environment, with a "full-time, at home mother." They further testified that any change in custody would be harmful to the child and that it would be in Katie's best interests to remain with the adoptive family. 1981 Tr. 12, 22. McNamara testified that he had initially refused to accept custody because "at that time I had [two young sons] with me, without a certain length of time, and I felt that it would be difficult [with] an infant but I knew that after a child grows up it's a lot easier to take of them . . . ." 1981 Tr. 36. McNamara further testified that at the second meeting with the social worker, he still did not want custody, but that by the third meeting he did. 1981 Tr. 36. Significantly, McNamara admitted that he had actual knowledge of his right under California Civil Code § 7006 to bring a filiation proceeding. McNamara did not offer any evidence to mitigate the emotional injury that Katie would experience if she were separated from her adoptive parents.

The trial court, relying on the evidence offered by the social workers that Katie had developed strong emotional ties and had bonded with her adoptive parents, concluded that the best interests of the child required that she stay with the adoptive couple. However, on August 22, 1984, the California Supreme Court reversed the trial court's decision, holding that the trial court had erred in failing to apply the custody standards of Section 4600 to the case and remanding for a factual determination of whether the child would suffer any detriment by giving

McNamara custody. The State court recognized that the child had bonded and that breaking that bond could be detrimental. Hence, the welfare of the child required consideration of the passage of time. J.S. App. 49a.

On remand, the County called Dr. Gerald E. Nelson, a board-certified psychiatrist. Having evaluated Katie in her adoptive family setting, he testified that if Katie's placement in the adoptive home were terminated, she would certainly experience six months to a year of severe psychological trauma:

> She would go through a very painful process which would—we call grief. It would be as though her parents had died, and she would initially be terrified, very sad, lonely. She would cry and she would protest, searching for her parents, trying to get any adult around her to return her to her parents.
>
> . . . .
>
> The second phase of loss, the despair, will last for several weeks . . . . Then the child will start to detach . . . . [S]he will stop thinking about her parents. She would stop running to the door. Though any time she hears a woman's voice that might sound like her mother or a car goes by that looks like her family . . . she will perk up and think, oh, they have finally come back for me, and this will go on again for several months.
>
> And, actually, if she were well cared for, all of this would be put into the unconscious and defended against, and that she would then resume her growth and development . . . . But what we find with these children is all through their lives, we see evidence of this trauma in that she will be sensitized to loss now.

2/25/1985 Tr. 79-81. Dr. Nelson further testified to the number of ways in which the lifelong sensitivity to loss might manifest itself:

> . . . So this child will fear that this might happen again. So she could do . . . one of a number of things. One, she might not form attachments. She would, say, . . . rather . . . not form attachments than to go through the pain of losing this attachment and suffer pain that I did when I was little. This will not be conscious . . . . She would withdraw . . . .
>
> Secondly, she may develop a clinical depression which is every time she has a loss . . . [s]he will then . . . immediately be placed back in the emotional and psychological framework that she . . . was in when she sustained the primary loss . . . .
>
> She will feel like a small child, overwhelmed with fear and sadness . . . . [T]here are reports that suicides occur when things like this happen, and she may need psychotherapy and anti-depressants.

2/25/1985 Tr. 81.

> . . . She might become ansus [sic], which means that she is vigilant; she is constantly fearful that someone is going to—to cause her to lose someone, and she may numb out.
>
> She may develop the mechanism of becoming insensitive. Now, she may not only become fearful of loss, but she will also be insensitive to the feelings of others because she has numbed out her own feelings.
>
> The insensitivity affects the child's ability to learn . . . .
>
> If she has numbed out, she needs more intense, clear messages which means that she is less able to adapt and in a complex situation, . . . their social skills are diminished.

2/25/1985 Tr. 87-8. Elaborating on testimony that the trauma of a change in custody would cause Katie to regress "across the board in all of the psychological and developmental phases that have to do with forming relationships," the psychiatrist further stated that certain developmental setbacks involving cognitive skills might not be recouped:

> Generally, you see an arrest of development . . . . The child still grows, but the emotional and psychological development seems to stop, and there are cognative [sic] things that go on all the time, like how to blend sounds, how to use speech in a certain way. Certain cognative [sic] skills seem to get lost and they lose them forever.
>
> Things like math skills, spelling skills, things like that seem to be associated with traumatic events in a child's life.

2/25/1985 Tr. 83.

Based on the expert and lay testimony, the trial judge determined that, because of the length of time the case had been pending in California courts:

> [T]he evidence is clear and convincing and, in fact, uncontradicted that Katie would suffer extreme emotional and psychological harm should she be removed from the [adoptive] home, and this harm constitutes detriment within the meaning of Civil Code 4600.
>
> I find that it would be in the best interest of the child that custody be awarded to [the adoptive parents] who are in almost every sense the true parents of this child.

2/27/85 Tr. 33. The Court of Appeal affirmed in a split decision filed April 30, 1987, noting that the record "firmly supports" the trial court's "factual determination as to the existence of [psychological] harm" to Katie. J.S. App. 6a, 8a. The San Diego County Superior Court entered a decree of adoption on August 7, 1987. On April 18, 1988, this Court deferred the question of jurisdiction to the hearing on the merits.[5]

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[5] This Court indeed lacks jurisdiction. Jurisdiction on appeal is precluded because at no time did McNamara present to State

SUMMARY OF ARGUMENT

Adoption is an important, worthy institution. State legislators give careful consideration to the complex statutory schemes necessary to make adoption work. Appellant's claims for relief, if acceded to, would make the process unworkable with respect to children of unwed, noncustodial fathers, and would greatly undermine public confidence in the institution of adoption as a whole.

The equitable relief sought here—custody and visitation rights—should be denied. Such relief is inappropriate because it contravenes important rights of the adopted child and her adoptive parents. McNamara's request for visitation rights is unworkable, impractical, contrary to the well-being of Katie and her adoptive parents, and inconsistent with the reasonable policy choices made by California legislators and courts. McNamara, further, has no constitutional right to protect here, as demonstrated by this Court's cases.

The relevant California statute does not unconstitutionally discriminate by failing to vest unmarried, noncustodial fathers with the right to "veto" adoptions. The "discrimination" serves important governmental objectives and is substantially related to the achievement of those objectives.

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courts any contention drawing into question the validity under the Constitution of a State statute; nor did the State courts decide any such issue. Certiorari jurisdiction does not lie for the reasons stated in Appellee's brief.

Furthermore, although Appellant cites authorities which discuss substantive rights under the Due Process Clause, his filings with this Court—and especially his statement of the issues—fail to address due process. In these circumstances, the Court should not *sua sponte* consider the extent to which the Due Process Clause governs the substantive rights of unwed, noncustodial fathers. See Sup. Ct. R. 15(a).

ARGUMENT

I. Appellant's Claims For Relief Imperil the Adoption Process.

As surely as it will shape the psychological and emotional destiny of a seven-year old child, and decide the fate of an adoptive family which has long flourished under color of State law, this case will determine the extent to which adoption remains a viable choice for biological and adoptive parents.

The benefits of adoption scarcely need stating. Adoption safeguards the welfare of children whose parents are unwilling or unable to care for them; eliminates the need for long-term State guardianship—a role that, despite efforts on many levels, has proved almost impossible for governments to fill effectively or economically; and bestows on illegitimate children the benefits of legitimacy. Adoption also saves biological parents from distressful burdens with which they would be unable to cope, thus freeing them to lead more productive lives. It provides a practical alternative to abortion; and—critically—secures for adoptees and childless couples opportunities to develop and enjoy deeply satisfying parent-child relationships.

The value of these benefits is inestimable, but there are a few objective indications. Over 140,000 children find homes each year through adoption. National Committee for Adoption, *Adoption Factbook* 5 (1985). Adopted children, moreover, are more likely to live in two-parent households: 90% of adopted children surveyed in 1982 had a currently married mother, as compared with 77% of children living with their birthmothers. *Id.*, at 62. Adopted children "enjoy more socioeconomic advantages than children who remain with their unmarried birthmothers." *Id.*, at 12. The 1982 study, furthermore, showed that "unmarried biological mothers who made

adoption plans advanced further educationally, were more likely to subsequently marry, and were less likely [indeed, less than half as likely] to receive public assistance than birthmothers who kept the child." *Id.*, at 12, 58.

These impressionistic data simply serve to illustrate the broader truth that adoption is a crucial element in the nation's approach to insuring decent lives and developmental opportunities for its children. It is, moreover, an approach that has required careful legislative consideration and complex regulation, as well as case-by-case judicial supervision, since the circumstances in which adoption is considered are diverse and the viewpoints relevant to each proposed adoption unique. Until now, the States have made the policy decisions and provided the supervision necessary to make the whole process work. It is indeed difficult to see how federal courts could assume the States' roles.

McNamara, however, would make virtually every aspect of the adoption of children of unwed, noncustodial fathers a constitutional issue. McNamara seeks to reinstate, as a matter of constitutional law, parental rights terminated fully seven years ago. He believes he has a right to this relief—not knowing his child or how she, as an *individual*, might react to such a drastic change in her circumstances—despite a State court finding (and expert testimony) that revocation of the adoptive placement would cause the child extreme emotional and psychological harm. Furthermore, McNamara asks for visitation rights, even though California adoption law does not provide for visitation as of right by biological parents, and even though the State courts considered the evidence offered below both in support of and against his visitation proposal and rejected that proposal. McNamara would have this Court require that every man alleged to be a father or claiming paternity be accorded a right to, effectively, "veto" an adoption by withholding consent.

This relief, if granted, would seriously compromise the adoption process. Prospective adoptive parents might well reject an alternative that involved a real risk of being forced to relinquish a child whom they had raised to the custody of a complete stranger. The fact that this relinquishment might be gradually, rather than abruptly, imposed—or that (in the event visitation rights alone are granted) it might involve only the loss of autonomy in the adoptive parent-child relationship, coupled with unsolicited and unwanted interference by biological parents—can hardly be expected to provide additional encouragement to such prospective parents. Moreover, as adoptive parents become aware that a natural father might, on any day, decide he had been denied an opportunity to develop a relationship with his child, the status of all current and future adoptions would be called into question. New adoptive parents could well be discouraged in their efforts to forge bonds with their children, knowing that in the future those children might be taken from them. In short, confidence in the adoption process as a whole would diminish sharply.

The veto requirement that McNamara asks this Court to impose has equally pernicious implications. Adoption must be quick, final and inexpensive if it is to serve the developmental needs of children, and if it is also to meet the needs of couples of all income levels. But a veto power in unwed, noncustodial fathers would interminably delay the adoption process and cause a drastic increase in adoption costs. Adoption agencies that arranged placements without effecting actual notice on all possible fathers would risk legal liability; and any adoption they arranged might prove voidable. Children whose fathers could not be located—a frequent phenomenon—would become unadoptable. Even where notice was effected, biological fathers might well vacillate in deciding on consent, and biological parents would find themselves embroiled in inappropriate negotiations or bitter disagreements. Mean-

while, their children would remain in legal limbo or with biological mothers unable to care for them properly. Developmental needs simply would be put on hold.

Contrary to McNamara's contentions, the serious blow he proposes that this Court inflict upon the adoption process is not compelled by the constitutional interest in parenting which the Court's caselaw delineates. As discussed below, whatever McNamara's rights may be, they do not encompass a right to an order granting custody or visitation rights. Furthermore, the "consent" provisions of which he complains, when viewed in the context of the entire State statutory scheme, are neither irrational nor invidious but instead are directly related to the important governmental interest described above: creating a workable system of adoption.

II. Where There Has Been A Seven-Year Adoptive Placement, An Unwed Father Who Has Never Had Custody Is Not Constitutionally Entitled To Custody Or Visitation.

McNamara frames his issues in equal protection terms and focuses primarily on the initial error in terminating his rights. The issue posed by this case, however, is more accurately to be regarded as one of substantive due process: whether McNamara's "opportunity interest" in developing a parent-child relationship with Katie overrides the now supervening interests of Katie herself, her adoptive parents, and the State. Whatever the extent of McNamara's opportunity interest in other contexts, *see, e.g., Lehr v. Robertson*, 463 U.S. 248, 263-65 (1983); *Stanley v. Illinois*, 405 U.S. 645, 657 n.9 (1972), that interest stops short of a constitutional right to imperil the developmental potential and psychological well-being of a child, abrogate the liberty interests of a family unit now long-established under color of State law, and strip the State of the power to implement a rational statutory scheme governing adoption.

A. McNamara Never Developed A Substantial Relationship With His Child And Has No Constitutionally Protected Right To A Relationship With That Child.

Under the facts of this case, McNamara has no constitutional right to a relationship with his child. In *Lehr*, this Court made absolutely clear that unwed fathers have merely "inchoate rights" to develop relationships with their illegitimate children and that "the mere existence of a biological link does not merit equivalent constitutional protection . . . ." 463 U.S. at 261. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." 463 U.S. at 260, quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). When an unwed father demonstrates a full commitment to accept the responsibilities of parenthood, then his interest in the child receives protection under the Due Process Clause. *Id.*

As Justice Stevens noted, "the difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* [*v. Walcott*, 434 U.S. 246 (1978)] and [*Lehr*], is both clear and significant." 463 U.S. at 261. In *Stanley v. Illinois*, *supra*, the unwed father had lived with, raised and supported his three children all of their lives. In *Caban v. Mohammed*, *supra*, the unwed father and mother lived together for approximately five years. During that time, Caban lived with, raised and supported his two children. Both Stanley and Caban thus had assumed all of the responsibilities of fatherhood. Under those facts, they had constitutionally protected rights to their relationships with their children.

The unwed fathers in *Quilloin* and *Lehr* had failed to assume the full responsibilities of parenthood and did not establish substantial relationships with their children. Accordingly, their rights did not merit constitutional protection. In *Quilloin*, the unmarried father did not

live with or raise his son. Over the years, he had provided support on an "irregular basis" and had visited with the child on "many occasions." Notwithstanding some relationship with the child, this Court concluded that the father had " . . . never shouldered any significant responsibility with respect to daily supervision, education, protection, or care of the child . . ." and that his rights could be terminated. 434 U.S. at 256.

In *Lehr*, the father did not live with, raise or support his daughter. He alleged that the mother had concealed the child's whereabouts from him, that he had hired a private detective to locate the child, and that he had offered, upon finding her, to support her. The father further alleged that the mother rejected his offer of support, refused any visitation and threatened to have him arrested. Thereafter, the father filed a paternity suit admitting paternity and requesting an order which would direct him to pay child support. 439 U.S. at 268-69. Notwithstanding his efforts to establish a relationship and the mother's concerted efforts to thwart him, this Court concluded that the father had no right to a hearing, that he had never developed a substantial relationship with his daughter and that his "inchoate" rights could be extinguished.

Like the fathers in *Lehr* and *Quilloin*, McNamara has never developed a substantial relationship with or assumed full responsibility for his child. Although he testified to an annual income of $15,000 to $17,000, the record does not show that McNamara ever offered to provide financial support or educational opportunities for his child. Nor has he ever engaged in any daily supervision of the child. Seven years ago, he visited the child twice. He is, for all practical purposes, a total stranger to the child. In short, McNamara did not take advantage of the opportunities that were available to him, and his "inchoate" rights do not merit constitutional protection.

The father in *Lehr* had a far stronger constitutional claim for entitlement to a relationship with his child than does McNamara. In *Lehr*, the father instituted a paternity suit—voluntarily submitting himself to the jurisdiction of the court and the power of the State—and asked for a court order directing him to support the child. McNamara had actual knowledge that he could institute a filiation proceeding, stay the termination proceedings, establish his paternity and begin to support his child. He chose not to pursue this right under State law and, in turn, rejected the opportunity that it offered to assume full parental responsibility for his child. Moreover, in *Lehr*, the mother actually sought to conceal the child's whereabouts from Lehr and to prevent the development of a relationship between the father and child. In the instant case, the State, in fact, made the child available for visitation. The State acted reasonably in accepting custody of the newborn from an unmarried woman, placing the newborn in a State-approved foster home and instituting the appropriate legal proceedings.[6]

B. Katie's Rights and the Rights of Her Adoptive Family Preclude Any Reinstatement of McNamara's Parental Rights.

A child is not the property of parents, biological or adoptive. Familial relationships do not appear and disappear upon issuance of an injunction. While, undoubtedly, government should presume in the first instance that a child's interests and well-being coincide with a custodial

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[6] Even assuming that the initial termination of McNamara's rights was improper, it does not follow that a right to parent existed seven years later. *See Schenck v. United States*, 249 U.S. 47, 52 (1918) ("we admit that in many places and in ordinary times the defendants in saying all that was said would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . ."). *Cf. Jacobsen v. Massachusetts*, 197 U.S. 11 (1905).

parent's expressed desire to retain parental rights, *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), that presumption cannot be indulged where there has been no custody and the child's well-being lies elsewhere. In short, the child herself has rights—rights, e.g., to avoid psychological trauma, *see Parham v. J.R.*, 442 U.S. 584 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), and to be permitted to reach her developmental potential. *Wisconsin v. Yoder, supra*, 406 U.S. at 209-49 (concurrence of White, J.; dissent of Douglas, J.); *Prince v. Massachusetts*, 321 U.S. 138, 170 (1943). *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-76 (1976). *Cf. also, e.g., Schall v. Martin*, 467 U.S. 253, 266 (1984) (recognizing that children are peculiarly susceptible to psychological harm). In addition, State law may create a protectible familial interest on the part of a child's actual custodian. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977) (hereinafter, *Smith v. O.F.F.E.R.*).

The corollary of this is obvious: government has no power to "award" a child, or "rights in" a child, as a remedy for a perceived infringement of a parent's civil rights. A biological parent's prayer for equitable relief does not justify sacrificing the conflicting rights of the child and of the child's custodian. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (it is a "basic concept of our system" that "legal burdens should bear some relationship to individual responsibility or wrongdoing"); *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940) (court of equity "may in the public interest, even withhold relief altogether"); *Hecht v. Bowles*, 321 U.S. 321, 329-30 (1944) (equity is "flexible" and characterized by "mercy and practicality").

Here, the testimony has been that a change of custody would devastate the child, psychologically and developmentally. The State courts accepted this testimony,

which is consistent with the current theories of experts in the field,[7] and which finds support as well in decisions of this Court recognizing the crucial link between established familial relationships and a child's development. *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 513 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977). *Cf. Lassiter v. Dep't of Social Services*, 452 U.S. 18, 32 (1981) ("child custody litigation must be concluded as rapidly as is consistent with

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[7] *See, e.g.*, J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* [hereinafter "BBIC"] 18, 31-35, 85-94, 147 (1979); J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 199-202 n. 10 (1979); S. Fraiberg, *Every Child's Birthright* 33-77 (1977); Provence, *Applications of Research on Parent-Child Relationships*, in Child Psychiatry: Treatment and Research 207-21 (1977); *Mother-Infant Attachment in Adoptive Families*, 56 Child Development 1543 (December 1985) (study concluding that "like nonadoptive mother-infant pairs, most adoptive mothers and their infants develop warm and secure attachment relationships"); *Continuity of Adaptation in the Second Year: The Relationship Between Quality of Attachment and Later Competence*, 49 Child Development 547 (September 1978) (study showing that infants found securely attached to their mothers at eighteen months showed superior adaptation and more autonomous functioning at two years than did infants found insecurely attached at eighteen months). *See also Bennett v. Marrow*, 59 App. Div.2d 492, 496, 399 N.Y.S.2d 697, 700 (1977):

> It was Dr. Provence's further testimony . . . that to remove a child from a [psychological, as opposed to biological] parent-child relationship would endanger the development of the child in many ways and could affect her academic success and her motivation to learn.
>
> This testimony is all the more significant in view of the record, which discloses that in January, 1977 [i.e., after a two-year separation of the child from her "psychological parent"] an intelligence test was administered to Gina Marie resulting in a score of 84, in the low-normal range, whereas in April, 1975 [before the separation] she scored 113. Despite efforts to explain away this rather disturbing pattern, it seems to be, at least to some extent, buttressed by the obvious and drastic decline in the physical, mental and emotional make-up of Gina Marie.

fairness"). Thus, according to the State courts, Katie was entitled to remain in her adoptive home and reinstatement of parental rights was a remedy unavailable to McNamara.

But Katie's rights are not the only impediment to McNamara's requests for custody and visitation rights. The record establishes as well a seven-year adoptive relationship, which developed under color of State law, and a familial bonding of the adoptive parents and their son with Katie. "[T]he importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life through instruction of children . . . as well as the blood relationship." *Smith v. O.F.F.E.R.*, 431 U.S. at 844. Although the liberty interests of families lacking a biological link must in large part be "ascertain[ed] from . . . the expectations and entitlements of the parties" under State law, such families cannot be dismissed for constitutional purposes "as a mere collection of unrelated individuals." *Id.*, at 844-45. In California, as elsewhere, "adoptive placement . . . implies a *permanent* substitution of one home for another." *Id.*, at 824, 826. *See* Cal. Civil Code § 228 (West 1982) (adoptive parents and their child will "sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation").[8]

[8] Although Katie technically was in a "preadoptive" setting prior to August 1987, that is a distinction without constitutional significance here. In contrast to the foster family relationship at issue in *Smith v. O.F.F.E.R.*, preadoptive families are not given to understand that they should love the child, but not too much. Instead, preadoptive placement is made for the specific purpose of allowing bonding to occur and avoiding the damage to the child of foster family limbo. Under California law, where a petition for adoption has been filed (as it was in this case), the State may "remove the child from the prospective adoptive parents only upon approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought." Cal. Civil Code § 224. A court can permit preadoptive parents to adopt despite opposition by the adoption agency if it finds that the agency's refusal to consent is not in the best interests of the child. *Id.*

In this case, Katie remained in a "preadoptive" setting for six and a half years, always pursuant to the County's insistence that the placement was valid and, for much of the period, pursuant to decisions of State courts upholding the termination of McNamara's rights. Although a preadoptive family might not at initial placement have familial interests of a nature such as would bear on a biological parent's constitutional claim for reinstatement of parental rights, the situation here was quite different. Given the legal rights and expectations that preadoptive parents do legitimately hold, the decisions of State courts purporting to terminate McNamara's parental rights, and the lengthy placement under color of State law, Katie's adoptive family has a constitutionally-protected liberty interest in their familial bond with the child.

Thus, the interests of Katie's adoptive family and of the State fully support the decisions of the courts below denying custody and visitation rights. Whatever the rights of biological fathers may be in circumstances such as McNamara's, equity should not aid them in efforts to tear apart the lives and psychological well-being of adoptive families, including, especially, the adoptive child.

C. California's Decision Not to Award Visitation Rights Must Be Respected.

As noted above, resolution of the often difficult problems arising from the parent-child relationship is fundamentally a State responsibility. *Lehr v. Robertson*, 463 U.S. at 256; *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982). In meeting this responsibility, the State must seek to make adoption fair and workable, and to insure that adoption meets children's needs to the fullest extent possible. Finality is crucial: adoption as an institution is gravely threatened when errors made at an early stage are permitted to "undo" a lengthy adoptive relationship.

The full force of the State's interest in adoption underlies its decision here to deny visitation, because, as the record reveals, McNamara actually seeks much more than visitation. He wants visitation rights that will ripen into custody, as his testimony below makes clear. 2/25/1985 Tr. 162, 163, 165, 166, 168, 169, 172-76, 180-82.[9] Moreover, McNamara evidently refuses to recognize the utter impracticality of his visitation rights proposal. Virtually insurmountable logistical difficulties aside, such visits can hardly be positive experiences for the child when her adoptive parents find themselves struggling during each visit to suppress the grief they feel at the renewed reminder of the prospective loss of their child. California's decision not to engage in such human experiments is commendable and compelling.

But even if McNamara could content himself with a remedy of visitation rights and no more, such relief nonetheless would be an inappropriate remedy for the alleged constitutional injustice he contends he suffered. California, respecting parental autonomy, does not provide for visitation of adoptes as of right by biological parents. *Cf. Odell v. Lutz*, 78 Cal. App. 2d 104, 77 P.2d 628 (1947). This is a valid policy choice by the State that reinforces the final as well as autonomous nature of the adoptive parent-child relationship. Research in the context of visitation rights ordered following divorces at-

[9] Indeed, he indicated that he might, but might not, permit the adoptive parents and sibling to visit Katie. 2/25/1985 Tr. 180-81. The testimony accepted by the courts below is that a gradual reunification would be less traumatic to Katie, but just as damaging ultimately, as an abrupt change, even if McNamara did a superb job of parenting and regardless of whether or not he arranged for Katie to have therapy. 2/25/1985 Tr. 95-98, 100-07. In this connection, *see BBIC* 95 ("A child's attachment to his psychological parent is normal and therefore not subject to therapeutic efforts [by mental health professionals] which are designed to affect pathologic manifestations. [A child] cannot be 'cured' of her love for her foster parents").

tests to the trauma children experience when subjected to authority of multiple parent figures. *See* J. Wallerstein & J. Kelly, *Surviving the Breakup: How Children and Parents Cope With Divorce* 27-30, 37, 49, 88, 123-26, 141-42, 277-78, 293-96 (1980) and J. Goldstein & A. Solnit, *Divorce & Your Child* 47, 98 n.1, 106 (1984).[10] Exposing a child to such conflicts perhaps can be justified following a divorce, since the child, and not just the parents, can be presumed to have an interest in maintaining already developed relationships with the competing adults. But justification for a court-imposed "open" adoption—where the child regularly sees both biological and adoptive parents—is hard to find. Even where biological and adoptive parents voluntarily choose an open adoption procedure, experts who study adoption are less than convinced that the benefits of the procedure outweigh the costs:

> [T]his open adoption practice primarily benefits the birth parents, and critics of the practice point out the following: (1) the practice dilutes the process of parental entitlement, a crucial element in adoption [by which the adoptive parent comes to have 'feelings of parental rightfulness to the child']; (2) the practice complicates the process of telling the child about the adoption and may lead to considerable confusion on his part; (3) the open adoption concept paves the way for a split parental identification, the results of which are patently unclear; and (4) the practice can lead to a child attempting to play the various parental figures against each other.

[10] *See also BBIC* 12:

> Unlike adults, who are generally capable of maintaining positive emotional ties with a number of different individuals, unrelated or even hostile to each other, children lack capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children become prey to severe and crippling loyalty conflicts.

There are, in addition, practical problems. For the adoptive parents, open adoption, however euphemized, reduces their role to that of caretakers. The parent-child bond, which begins with a certain fragility, and is made stronger with each passing day under a traditional arrangement, is significantly compromised. To do an effective job, adoptive parents must feel that this is their own child, not that they are filling in for the 'real' parents. Adoptive parents should not be expected to wonder if the birth mother would approve of the handling of a given situation. Finally, to the extent that the birth parents are struggling with guilt over not assuming the parental role, the adoptive parents may feel that they have somehow stolen the child. This arrangement can hang over the family like a cloud that will not dissipate.

There are problems for the adopted child as well. Children need to know who are the real parents, and who carries ultimate authority over their lives . . . .

> Open adoption violates the very essence of sound adoptive practice since there is no unconditional severing of the earlier parental ties, the legal relinquishment notwithstanding.

Smith & Miroff, *You're Our Child: The Adoption Experience* (1987).[11] Clearly, if the pros and cons of visitation during adoption are to be decided by government at all, it would be a matter for legislative, and not judicial, judgment.[12] Even if this were not so, the State

[11] *See also Some Theoretical Considerations of Confidential Adoptions, Parts I and II*, 2 Child & Adolescent Social Work Journal 13-21, 69-82 (Spring 1985, Summer 1985); M. Jones, *The Sealed Adoption Record Controversy: Report of a Survey of Agency Policy, Practice and Opinions* (Child Welfare League of America 1976) (in a survey of 163 adoption agencies, *no* agency said it would encourage contact between the parties after adoption).

[12] There are other practical reasons for California's no visitation policy as well. *See Caban v. Mohammed*, 441 U.S. at 410 n.20 (Stevens, J., dissenting) (citing a 1961 Florida study of 500 independent adoptions which showed that "16% of the couples who had

courts here considered the evidence McNamara offered in support of visitation and have rejected the proposal.

In sum, McNamara's claim that he is constitutionally entitled to custody or visitation rights cannot, at this late date, be viewed independently of the interests of Katie, her adoptive family, and the State. So viewed, McNamara's claim must fail.

III. The California Statute Requiring The Consent of Unwed Mothers And Presumed Fathers For Adoptions Does Not Violate The Equal Protection Clause.

McNamara has raised two arguments that the California statute—which requires the consent of biological mothers and presumed fathers as a prerequisite to adoption, but not the consent of unwed, noncustodial fathers —violates the Equal Protection Clause. First, McNamara contends that the statute draws an impermissible distinction between presumed fathers and putative fathers. Second, McNamara contends that the statute, as applied, makes an unconstitutional gender-based distinction between unwed mothers and unwed fathers. McNamara's contentions are unfounded because the statute makes constitutionally permissible distinctions.

Subjecting men and women to "disparate treatment when there is no rational relation between the disparity and an important state purpose" contravenes the Fourteenth Amendment. *Lehr v. Robertson*, 463 U.S. at 266.

direct contact with the natural parents reported subsequent harassment, compared with only 2% of couples who had no contact"). Another much more recent study notes that biological fathers who institute searches for their adopted children, in contrast to biological mothers who initiate such searches, are highly likely to harbor serious thoughts of taking the child back. Deykin, Patti & Ryan, *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birthfathers*, 58 Am. J. Orthopsychiatry 240, 244, 248 (April 1988). California's decision not to expose adoptees to kidnapping or adoptive parents to harassment should be respected.

States may not discriminate arbitrarily or irrationally among men and women in determining parental rights. *Id.*, at 264, 268 n. 27. But there is nothing invidious, irrational or happenstance about the operation of California's consent provisions. The distinction between presumed and putative fathers focuses on the parent who has actual or legal custody of the child and is constitutionally permissible. *Quillion v. Walcott*, 434 U.S. at 256 ("Appellant's interests [as an unmarried father] are readily distinguishable from those of a separated or divorced father, and accordingly [we] believe the State could permissibly give Appellant less veto authority [over an adoption] than it provides to a married father"). Thus, McNamara's first contention is without merit.

Turning to McNamara's second contention, the consent provisions do not violate the Equal Protection Clause because they make gender-based distinctions that serve important governmental objectives and are substantially related to achievement of those objectives. *Parham v. Hughes*, 441 U.S. 347, 359 (1979); *Caban v. Mohammed*, 441 U.S. at 388. The welfare, prompt placement and final adoption of illegitimate children are important governmental interests. *Lehr v. Robertson*, *supra* (State has compelling interests in prompt, final adoption placements); *Caban v. Mohammed*, *supra* (State has a strong interest in providing for the moral, emotional and physical needs of children). In his brief, Appellant concedes this point. Br. at 29-30. The State's interest is even greater where the welfare of newborn infants is concerned. The California consent provisions are substantially related to the achievement of these important State interests.

The "discrimination" of which McNamara complains is permissible because unwed, noncustodial fathers and unwed mothers are differently situated. Only the biological mother carries the child and has the constitutional

right to decide whether to bear it. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-75 (1976). Throughout pregnancy the mother must face decisions about how best to care for the developing child. The mother's identity is known with certainty and, in most cases, she will have custody of the newborn infant. Hence, she is the logical choice as the parent with the power to consent to the adoption.

Unwed biological fathers, on the other hand, are not readily identifiable. Many unwed fathers cannot be found, others deny paternity and still others simply refuse to cooperate in the adoption process. *Caban v. Mohammed*, *supra*, 441 U.S. at 380 (Stewart, J., dissenting) (". . . the vast majority of unwed fathers have been unknown, unavailable, or uninterested"); *accord*, *Stanley v. Illinois*, *supra*, 405 U.S. at 665 (Burger, J., dissenting); *see also*, *Lalli v. Lalli*, 439 U.S. 259, 269 (1978) ("The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned . . . . Indeed, the mother may not know who is responsible for her pregnancy"). Requiring the consent of putative fathers would needlessly complicate and delay the adoption process.[13] It would be tantamount to grant-

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[13] In addition, a putative father's right to "veto" an adoption would amount to a post hoc overruling of the biological mother's decision to seek adoption as the best care alternative for her baby. Mothers should not automatically be presumed to be acting out of spite in opposing custody by a biological father. The mother's reasons could range from her knowledge of the father as a criminal or rapist to her preference for a stable, two-parent family for her child. In this case, at the time of the initial hearing, McNamara was unemployed, divorced, and caring for two sons of whom he had actual, but not legal, custody. 1981 Tr. 27-28; 37-39; 2/25/1985 Tr. 160. He testified at the hearings that he wanted Katie because he had a "right" to her, and that she would be in the care of a babysitter during the day. 1981 Tr. 34-35; 2/27/1985 Tr. 173-74. *See BBIC* 21 ("To be wanted ceases to be beneficial [to the child] to the degree that 'wanting' the child is not based on reciprocity of feelings and on recognition of the child's own per-

ing joint custody of newborns to unmarried parents who are not cohabitating—clearly an unwise and intrusive proposal.

The State and the child have a strong interest in immediate placement. Each year about fifteen percent of the children born in the United States are illegitimate. *Caban v. Mohammed*, *supra*, 444 U.S. at 402 n.2. (Stevens, J., dissenting). Each year approximately seventy percent of these children are adopted. *Id.* Unless a State statutory scheme allows for the prompt and immediate placement of newborn infants, the State and the infants will suffer. Absent prompt adoptions, the State must provide foster care involving a substantial investment of community resources.[14] Such infants do not receive the stable two-parent loving environment that they need to develop properly. *Lehr v. Robertson*, *supra*, 463 U.S. at 266 ("it has long been accepted that illegitimate children whose parents never marry are at risk medically, emotionally and educationally"); BBIC 46 ("infants born as a result of an unwanted pregnancy are greatly at risk of an initially much reduced chance of healthy growth and development. This risk is avoided when the infant is placed with loving adults at birth"). Moreover, as an infant grows older, it is far less likely to be adopted. As a result, the

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sonal characteristics. The child is placed in jeopardy whenever the adults' claim for him is based solely or predominantly on motives such as the wish to gain some financial advantage; to score over a warring partner after divorce . . . to cement an insecure marital relation . . ."). No position is taken here on what, if any, weight circumstances similar to McNamara's should have in termination proceedings. The point is that a relinquishment can be, and in most instances is, a caring decision, and the mother's desire to have the adoption proceed deserves statutory protection.

[14] Although 274,000 children were in foster care in 1982, and although many of these children were available for adoption, only 9,591 adoptions of children by foster parents occurred in that year. National Committee for Adoption, *Adoption Factbook* 11 (1985).

State's interest and the infant's needs compel a statutory scheme that allows adoption to occur as quickly as possible. By requiring only the mother's consent where the father is unwed and noncustodial, California's statute advances the interest of the State, mother and infant. It streamlines the adoption process and allows for prompt and final placement of infants into stable, loving homes. At the same time, it provides unwed fathers with the right to notice and a hearing concerning custody. As applied, the California statute does not engage in impermissible gender-based discrimination between unwed mothers and unwed fathers over the right to consent to the adoption of a newborn infant.

CONCLUSION

For the reasons stated, and for the further reasons presented in Appellee's brief, Amicus respectfully requests that the decision of the California Court of Appeal be affirmed.

Respectfully submitted,

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No. 87-5840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

On Appeal From The Court Of Appeal Of The State Of California Fourth Appellate District, Division One

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AUTHORITY FOR BRIEF

This amicus curiae brief is filed pursuant to Supreme Court Rule 36.2, with accompanying written consent of both parties, in support of appellee.

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INTEREST OF AMICUS CURIAE

The National Committee For Adoption ("NCFA") is a nationwide, charitable organization, formed in 1980, with headquarters in Washington, D.C. NCFA is comprised of numerous private adoption agencies and individuals interested in adoption from nearly every state in the country. Its fundamental objective is to promote adoption by encouraging sound adoption policies and practices. NCFA is involved in the accreditation of private adoption agencies, monitors legal developments in the adoption field, gathers and disseminates statistics and practical information regarding adoption, and counsels with individuals and agencies concerning pregnancy, out-of-wedlock births, infertility, and other matters related to adoption. NCFA does not purport to advance the interests of only natural mothers or fathers, or of only adopted children or adoptive parents. Rather, NCFA advocates a balanced, informed, and fair consideration of the competing rights and interests of all concerned.

This case is of particular concern to NCFA because a ruling in favor of the appellant unwed father would create in all such fathers an absolute right to veto the adoption of their offspring without regard to their true relationship with their child or to the best interests of the child. Such a result would seriously damage the adoption process by deterring relinquishment of out-of-wedlock infants for whom adoption is the best alternative, by delaying the adoptive placement, and by discouraging adoptive parents from coming forward to participate in the process. Most damaging in this case would be the psychological and emotional harm to the adoptive child and parents, who have been a family now for seven years.

Appellant's alternative request for visitation rights is equally threatening because it would alter the traditional form of adoption beyond recognition. The essential elements of exclusivity, finality, and normalcy would be sacrificed in the quest for supposed equity.

NCFA here respectfully attempts to provide the Court with information and insight to demonstrate that the decision of the state court, leaving the adoptive family intact, should be affirmed.

SUMMARY OF ARGUMENT

The law, as set forth in decisions of this Court, does not require the consent of all unwed fathers to the adoption of their newborn children. Unless an unwed father timely develops a substantial relationship with his child, or otherwise manifests in a prescribed manner his paternal commitment to the child, the child may be adopted with the exclusive consent of the mother. The best interests of the child should not be sacrificed in a quest for precise equality of parental rights.

To grant all unwed fathers a veto power over the adoption of their offspring, without regard to the child's best interests or to the father's actual paternal relationship and demonstrated commitment to the child, would unnecessarily delay, complicate, and impede the adoption process. Unwed mothers would choose less desirable alternatives in order to avoid or circumvent the adoption system; they would settle for premature or undesired parenting; more babies would be aborted, placed in indefinite foster care, taken out of the country for adoption, or illegally marketed; adoptive parents would choose not to adopt or would be threatened in their existing adoptive relationships; and social costs and personal tragedy would increase.

Appellant's request for visitation rights should be denied because visitation would be contrary to the nature of adoption, and appellant has no pre-adoption relationship with the child that justifies preservation.

ARGUMENT

I. EQUAL PROTECTION DOES NOT REQUIRE THAT ALL UNWED FATHERS OF *NEWBORNS* BE AFFORDED AN ADOPTION VETO POWER EQUAL TO THAT OF UNWED MOTHERS OR "PRESUMED FATHERS."

Appellant argues that he is entitled to the same right of consent to the adoption as that vested by statute in the child's mother and in presumed fathers. (Appellant's Br. at 30-35.) However, long-settled law and public policy are to the contrary.

A. The Law

From earliest times, the law has distinguished between the legal rights of unwed mothers and fathers with regard to custody and adoption of their children born out of wedlock. At common law, an out-of-wedlock child was regarded as the "son of no one." *See generally* H. Clark, *The Law of Domestic Relations in the United States*, 149-52 (2d ed., Student ed. 1987). The common law recognized the mother's exclusive, primary right to custody of the child based on the fact that the child was born into her custody and on the presumption that the mother was a better custodian than the putative father. *Id.* at 197. This presumption was "based upon the ease with which the mother could be identified and located, the obligation normally placed by society on the mother to care for and raise her children, and the strength of the bonds of love and affection assumed to exist between mother

and child." Comment, "Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective," 15 Seton Hall L. Rev. 290, 295 (1985). These principles carried over into adoption statutes, the majority of which required the consent of only the mother as a prerequisite to the adoption of an out-of-wedlock child. The primary objectives of such statutes are to further the welfare of out-of-wedlock children and to encourage marriage and the formation of family units. *Id.* at 296-97.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held that unwed fathers who have an established paternal relationship with their children are constitutionally protected in that parental interest and cannot be deprived of custody of their children without notice and an opportunity to be heard. However, in *Stanley* the Court dealt with a father who had lived with the children's mother for 18 years; who had "sired and raised" his children, *id.* at 651; and who had demonstrated and developed a parental interest "in the companionship, care, custody, and management" of his children, *id.* As subsequent cases demonstrate, those same constitutional protections need not be accorded unwed fathers whose relationship with their offspring is purely biological.

For example, in *Quilloin v. Walcott*, 434 U.S. 246 (1978), this Court upheld the adoption of an out-of-wedlock child over the objection of the unwed father because the father had "never exercised actual or legal custody over his child, and thus ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.* at 256. In designating which fathers have a right of consent to the adoption of their children, a state is "not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child." *Id.* Conversely, as decided in *Caban v. Mohammed*, 441 U.S. 380 (1979), a state may not withhold the right of consent from an unwed father whose long-term relationship with his children is "substantial," *id.* at 387, and "comparable to that of the mother," *id.* at 389. However, the *Caban* Court emphasized that its holding was based on the "significant paternal interest" manifested by the father, *id.* at 394, and noted that there would be sufficient justification to withhold the right of consent from a father who has developed no such relationship, such as the unwed father of a newborn child.[1]

Most recently, in *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court upheld a statute that accorded

[1] The *Caban* Court stated:

> Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. [*Id.* at 389.]
>
> . . . .
>
> Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy. . . . In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. [*Id.* at 392.]

The dissenting opinions of Justices Stewart and Stevens develop the basis for distinction between the consent rights of mothers and fathers of out-of-wedlock newborns, and both emphasize that the *Caban* majority opinion does not question the validity of that distinction. *Id.* at 399, 409, 416.

unwed mothers a right of consent to the adoption of their children, but which withheld the right of consent from unwed fathers unless they timely registered their paternity or otherwise manifested their interest and commitment by any of several prescribed means. The Court emphasized that "the rights of the parents are a counterpart of the responsibilities they have assumed." *Id.* at 257. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' " his interest and rights acquire substantial constitutional protection. *Id.* at 261. But a mere "biological link" to the child merits no such protection, *id.*, and if the father fails to grasp the opportunity to develop a protected relationship, "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262. Since the father in *Lehr* had "never established a substantial relationship with his daughter," he and the mother were not in fact similarly situated with regard to the child, *id.* at 267, and the State was not precluded "from according the two parents different legal rights," *id.* at 268.[2]

[2] As this Court has noted in a different context, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The differences between men and women with regard to the birth and care of out-of-wedlock children are evident. *See Caban, supra*, 441 U.S. at 404-05 (Stevens, J., dissenting). As observed in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981):

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.

Since the appellant unwed father in the present case developed no substantial relationship with his daughter and failed to take the available actions that would have guaranteed him a right of consent to the adoption, the statute did not operate to deny equal protection. Appellant was afforded a hearing at which adoption was found to be in the child's best interests. This Court must reject appellant's quest to synchronize the adoption consent rights of unwed parents at the expense of the child's best interests. Equal consent rights would be hollow and meaningless if allowed to override the best interests of the child.[3]

B. Public Policy

This case concerns the constitutionality of the methods by which states attempt to deal with one of the most serious social problems of our day—the rising number of out-of-wedlock births. In 1982, the most recent year for which comprehensive statistics are available, 715,227 children were born to unmarried mothers, comprising nearly 20 percent of all live births in the United States. National Committee For Adoption, *Adoption Factbook--United States Data, Issues, Regulations and Resources* 103 (Washington, D.C. 1985) (hereinafter *Adoption Factbook*). During the

[3] It is not enough for an unwed father merely to step forward and object to the adoption. The father may be unfit to assume parental rights and responsibilities. *See In the Interest of K*, 535 S.W.2d 168 (Tex. 1976), *cert. den.*, 429 U.S. 907 (1976). His commitment and capabilities may be lacking. *See Travis County Child Welfare Unit v. Vance*, 566 S.W.2d 112 (Tex. Civ. App. 1978); *In the Interest of C D V* , 589 S.W.2d 543 (Tex. Civ. App. 1979) (father in penitentiary).

same year, there were 141,861 total adoptions. The vast majority of unrelated adoptions were children born out of wedlock. *Id.* at 102; Office of Population Affairs, U.S. Dept. of Health and Human Services, *The Adoption Option: A Guidebook For Pregnancy Counselors* 15 (1987) (hereinafter *Adoption Option*). On the other side of the adoption picture stand approximately 2 million married couples who are infertile, comprising about 15 percent of all married couples, many of whom have waited years on long adoption waiting lists. *Adoption Option, supra*, at 15; Interagency Task Force on Adoption, *America's Waiting Children: A Report to the President from the Interagency Task Force on Adoption*, 9, 33 (Washington, D.C., March 1988) (hereinafter *America's Waiting Children*). Thus, adoption is a vital process and means by which society's most helpless and needy members are joined with anxious and loving parents to satisfy the needs of both. Adoption represents a valuable option for unwed mothers to assist them in planning for their own lives as well as for the best interests of their children.

Requiring the unwed father's consent to adoption in cases such as this would unnecessarily burden and complicate this laudable process. As Justice Stewart noted in his *Caban* dissenting opinion, "the consent of only one parent should ordinarily be required for adoption of a child born out of wedlock. The mother has been chosen as the parent whose consent is indispensable. A different choice would defy common sense." 441 U.S. at 395. Three other members of the *Caban* Court joined in that view:

> Most particularly, these differences [between men and women] justify a rule that

> gives the mother of the newborn infant the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the loving father an incentive to marry the mother, and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible. Put most simply, it permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed.
>
> This conclusion is borne out by considering the alternative rule proposed by appellant. If the State were to require the consent of both parents, or some kind of hearing to explain why either's consent is unnecessary or unobtainable, it would unquestionably complicate and delay the adoption process. [441 U.S. at 407-08, Stevens, J., dissenting.]

Unnecessary delay of the adoption undermines the entire statutory scheme by lessening the chances of adoption and depriving the child of early and uninterrupted bonding to its parents. *Lehr, supra*, 463 U.S. at 265; *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 513-14 (1982); *Wells v. Children's Aid Society*, 681 P.2d 199, 203 (Utah

1984).[4] The adverse psychological and emotional impact on the child caused by delay is unquestioned. Bonding with adoptive parents is either totally lost, if the child is in foster care, or weakened by the adoptive parents' uncertainty in the situation. Goldstein, Freud, and Solnit, *Beyond The Best Interests of The Child* 22 (The Free Press, 1979) (hereinafter *Best Interests*). Beyond early infancy, a child in foster care "feel[s] the impermanency and insecurity of the arrangement which clashes with his need for emotional constancy." *Id.* at 25. Accordingly, "to avoid irreparable psychological injury, placement, whenever in dispute, must be treated as the emergency that it is for the child." *Id.* at 43.[5] While unwed parents fight

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[4] As one scholar has noted:

> [T]hose concerned about the welfare of an illegitimate infant cannot keep the child indefinitely in limbo, waiting to see what "functional equivalents" of marriage the father will demonstrate if he is given plenty of time. It is not difficult to sense the risks to a child in such circumstances, knowing as we do how much every child needs a sense of continuity and stability in the child-parent relationship. Quilloin's waiting child is a vivid symbol of the way all persons wait in a noncommittal relationship, whether child or adult, at risk in a sea of uncertain expectations.

Hafen, "The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests," 81 Mich. L. Rev. 463, 498-99 (1983).

[5] *See also* Buchanan, "The Constitutional Rights of Unwed Fathers Before and After *Lehr v. Robertson*," 45 Ohio St. L.J. 313, 364 (1984) (A child's "need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child.").

over consent to the adoption, their child joins the 274,000 children already in foster care, and adds to what is nearly a billion dollar burden of funding the care. *Adoption Factbook, supra*, at 42-43; *see also In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 489-90 (1975).

Requiring the unwed father's consent to the adoption also threatens the mother's right of privacy by inducing unwanted disclosure of her and the father's identity. *Lehr, supra*, 463 U.S. at 264; *Caban, supra*, 441 U.S. at 408-09 n.17 (Stevens, J., dissenting). More devastating to the adoption process and the child is that to avoid disclosure and conflict, the mother may simply withhold the child from adoption and raise the child herself against her wishes and best judgment, thus foreclosing the child's opportunity for a better life, as well as reducing the number of children available to potential adoptive parents. *Adoption Factbook, supra*, at 18; *Adoption Option, supra*, at 13.

The President's Interagency Task Force on Adoption identified the requirements of notice to or consent of uninterested fathers as one of the major barriers to adoption in this country:

> The father of the baby may delay or cause an adoption plan to be cancelled, even when he does not intend to raise the baby himself or has provided no financial or emotional support before or after the baby's birth. [*America's Waiting Children, supra*, at 20.]

The Texas Supreme court, in upholding a statute that accorded unwed mothers preferred parental status with regard to adoption of their out-of-wedlock children, similarly observed:

> To classify [the unwed father] as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother.

In the Interest of T.E.T., 603 S.W.2d 793, 797 (Tex. 1980).[6]

This forced retention of out-of-wedlock babies by their unwed mothers has a lasting detrimental impact on the mother, the baby, and society as a whole. Statistics show that young unwed mothers who relinquish their children for adoption advance further educationally and economically, are more likely to subsequently marry, and are less likely to receive public assistance than unwed mothers who keep and raise their babies themselves.[7] "It has long been accepted that illegitimate children whose parents never marry are 'at risk' economically, medically, emotionally, and educationally." *Lehr, supra*, 463 U.S. at 266 n.25. By

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[6] Experience demonstrates that many unwed fathers withhold adoptive consent solely to harass the mother, by forcing her to keep the baby against her will, or to maintain contact and coerce marriage with the mother, and that mothers, faced with uncertainty regarding finality of the adoption or with the possibility that the father may obtain custody, will simply keep their babies. *See Caban, supra*, 441 U.S. at 407 n.13; Note, "The Putative Father's Due Process Rights to Notice and a Hearing," 1986 B.Y.U. L. Rev. 1081, 1093-94 n.47.

[7] 77 percent of mothers who relinquish their babies completed high school, as compared to 60 percent of those who kept their babies. 18 percent of mothers who relinquished were classified as "poor," as compared to 40 percent of mothers who did not. The percentage of women who received some form of public assistance was twice as high among women who kept their babies. *Adoption Factbook, supra*, at 12, 58.

contrast, women who adopt children are more likely to be married, older, better educated, and better-off financially than mothers who keep and raise their illegitimate children themselves. *Adoption Factbook, supra*, at 55, 62-63. Accordingly, adopted children enjoy more educational and socioeconomic advantages than children who remain with their unmarried birth mothers. *Id.* at 12, 62.

In order to avoid unreasonable notice and consent requirements on the one hand, and the adverse consequences of keeping and raising their babies on the other hand, many unwed mothers may be forced to choose even less desirable alternatives. A growing choice for many unwed mothers is abortion. The President's Task Force on Adoption reported abortion as the number one barrier to adoption, with teenage mothers involved in nearly one-third of the 1,573,920 abortions in 1982. *America's Waiting Children, supra*, at 17; *Adoption Factbook, supra*, at 18. It is ironic, to say the least, that an unwed mother has the exclusive power over the life or death of her child, with the right of abortion, but, according to appellant, has no similar control when it comes to adoption.

While adoption is clearly an alternative to abortion, the choice is not viable where, as appellant claims, the father can upset the mother's well-considered plan by withholding consent. When adoption could provide a positive solution that meets the needs of all parties, the result may instead be coerced abortion to avoid the problematic situation described in *Roe v. Wade*, 410 U.S. 113, 153 (1973):

> Maternity, or additional offspring, may force upon the woman a distressful life and future.

> Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

An unwed mother considering abortion or adoption is not likely to choose adoption if conflict with the father is the price she pays for choosing life for the baby.

Unwed mothers who do give birth are turning more frequently to independent adoption arrangements in which the legal requirements pertaining to the unwed father may be more easily circumvented.[8] As more rights are accorded to the unwed father, the mother becomes more likely to engage in deception to protect the welfare of the baby. Mothers either withhold the father's identity, falsely declare it as "unknown," or use a current boyfriend to pose as the father and sign the consent to adoption. When the baby's best interests are at stake, there is little overriding incentive to be honest in identifying the father. *See* 1986 B.Y.U. L. Rev., *supra*, at 1093-94.

Independently arranged adoptions more and more frequently result in removal of out-of-wedlock infants to foreign countries to avoid the strictures of domestic adoption law. As a consequence, those babies lose

[8] The number of independently arranged adoptions increased to 33 percent of unrelated adoptions in 1982. *Adoption Factbook*, *supra*, at 104; yet studies show that the failure rate of such adoptions is twice as high as for agency adoptions, *id.* at 47.

their American citizenship and the opportunities of being reared in this country. Independent adoptions are also more apt to lead to exploitation of the mother and baby or to illegal placements:

> Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. . . . While it may appear, at first blush, that a father might wish to free himself of the burden of support, there will be many who will interpret it as a chance for revenge or an opportunity to recoup their "losses". [*In re Adoption of Malpica-Orsini*, *supra*, 331 N.E.2d at 490.]

Finally, what of the impact on the child and the adoptive parents if one of the biological parents is permitted to arbitrarily revoke or dispute consent? The terrible and lasting psychological and emotional injury to the child caused by interrupting a bonded, loving parent-child relationship is well documented. *See Best Interests*, *supra*, at 31-52. The evidence to that effect in this case is substantial and convincing. *See* Joint Appendix pp. 13-20. In addition, as the number of infants available for adoption decreases, more and more couples resort to foreign adoptions, which increased by 46 percent from 1982 to 1984. *Adoption Factbook*, *supra*, at 14, 104. Many other couples considering adoption "will be dissuaded out of fear of subsequent annoyance and entanglements." *In re Adoption of Malpica-Orsini*, *supra*, 331 N.E.2d at 489. Those couples who assume the risk and develop an interdependent family relationship with an adopted

child have a constitutionally protected interest in continuing the relationship. *See Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 843-44 (1977). If that protected adoptive relationship is subsequently terminated, the adoptive parents' emotional involvement, time, and expense go for naught, and other couples will obviously be deterred from adopting. *See Wells v. Children's Aid Society, supra*, 681 P.2d at 203. The *Wells* court accurately observed:

> If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations [of who will assume the parental role] must also be final and irrevocable. [*Id.* at 206-07.]

II. APPELLANT'S ALTERNATIVE REQUEST FOR VISITATION RIGHTS MUST BE REJECTED AS CONTRARY TO THE NATURE AND FUNCTION OF ADOPTION AND BECAUSE HE HAS NO ESTABLISHED RELATIONSHIP WITH THE CHILD.

Appellant argues that because "[i]t is doubtful that [he] would get custody at this time," he should be awarded visitation rights. (Appellant's Br. at 45.) However, such an award would destroy the integrity and essence of adoption as we know it, would be contrary to the best interests of the child, would violate the wishes of the relinquishing biological mother, and would violate the rights of the adoptive parents.

Adoption is the legal process by which permanent and exclusive custody of a child is transferred from biological parents to adoptive parents. The adoption

terminates all rights and responsibilities of the biological parents respecting the child and irrevocably bestows those rights and responsibilities on the adoptive parents. The adoption severs all legal ties between the child and the biological parents, and the child assumes the status of the adoptive parents' natural offspring. *Adoption Factbook, supra*, at 10; *America's Waiting Children, supra*, at 5; *Adoption Option, supra*, at 11; Comment, "Visitation After Adoption: In the Best Interests of the Child," 59 N.Y.U. L. Rev. 633, 635, 640-42 (1984).

Awarding visitation rights to parents of out-of-wedlock children adopted at infancy would necessitate departure from traditional and legal confidentiality of adoption records. The reasons for closed adoption records are sound and historically proven: (1) to preserve the privacy of birth parents' and their families; (2) to protect the adopted child from potentially disturbing facts surrounding his birth; (3) to enhance the child's feeling of permanency and the adoptive family's stability; and (4) to allow adoptive families the uninterrupted opportunity to bond themselves to their adopted child. *Adoption Factbook, supra*, at 65. Each of these ends would be undermined by forced visitation. *See Best Interests, supra*, at 116-21. It is the right of the custodial parents, not of the courts, to determine if and when visitation with a biological parent would be appropriate. *Id.* at 117.

Even those who advocate mixing visitation with adoption acknowledge that "the goal of visitation is to preserve and encourage a relationship that is beneficial to the child, not to start a new one." Comment, *supra*, 59 N.Y.U. L. Rev. at 645. "Unlike an infant, the older child has developed emotional and psycho-

logical ties with natural family members that may affect her adjustment to new surroundings." *Id.* at 660. The primary premise for post-adoption visitation is the existence of a substantial pre-adoption relationship, *id.* at 664, absent which visitation would be unjustified:

> When a noncustodial relative wants visitation rights, it should not be presumed that a substantial relationship exists. The goal of visitation is to encourage and preserve a relationship, not to start a new one. *If there has been no previous relationship, the relative is just like a stranger, and the adoptive parents should have control over the child's contact with him.* In seeking contact, the relative may not even have the child in mind; rather, he may be experiencing guilt and a sense of loss from the absence of a relationship. Neither of these feelings suggests that visitation is necessary for the child's welfare. [*Id.* at 665, emp. added.]

In the present case, the adopted child was relinquished and placed as an infant. Appellant had no substantial pre-adoption relationship with her. Accordingly, there is no basis or justification for an award of forced visitation. If, when the child is grown, she develops an interest in meeting her biological parents and developing a relationship with them, mutually-desired meetings may be arranged through the state adoption registry available in California. Until that time, as research shows, Katie would have a more positive self-concept and a more positive feeling toward adoption and her adoptive family without visitation by her biological father. *See Adoption Factbook, supra,* at 66.

CONCLUSION

Based on the foregoing, the National Committee For Adoption strongly urges the Court to affirm the decision of the lower court.

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Respectfully submitted,

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